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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 821

THOMAS D. AIKEN, TILLIE DAVENPORT, LILLIAN H. ESSIG, PAUL FETCHENEROWSKI, ELLA A. GALLAGHER, JOHN WILLIAM HAM, E. MORTON INGRAHAM, ADA L. JAMES, JUNEA W. KELLY, PETER J. McARRON, JOHN W. OSBORN, AUGUST H. PETERSON, VICTOR A. RASMUSSEN, GUS H. TESSMAN, C. J. UNGS, JEFFERSON D. WALTERS, JOHN P. YOUNG, FRANK S. PIPER, CHARLES P. BECKER AND BERTHA D. WILLIAMS,

Plaintiffs-Petitioners,

vs.

SAMUEL INSULL, JR., PHILIP J. McENROE, JOHN F. GILCHRIST, EDWARD J. DOYLE, JOHN G. GULICK, GEORGE F. MITCHELL, MARSHALL E. SAMPSELL, STUYVESANT PEABODY AND HARRY L. STUART,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDMUND D. ADCOCK,
33 North La Salle Street,
Chicago, Illinois,

ROGER Q. WHITE,
120 South La Salle Street,
Chicago, Illinois,

LEWIS F. JACOBSON,
33 North La Salle Street,
Chicago, Illinois,
Counsel for Plaintiffs-Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement of the Matters Involved.

This is a class suit in equity filed February 3, 1933 by holders of debentures issued by Insull Utility Investments, Inc. (called herein for convenience "I.U.I."), against the

directors of I.U.I. principally on two causes of action: (1) for inducing and causing the pledging of substantially all the corporation's assets to certain banks in violation of covenants in the debentures held by the plaintiffs, and (2) for liability under an Illinois statute for declaring or assenting to dividends in impairment of capital or while insolvent (R. 2-38).

In respect to the second cause of action, relating to liability for improper dividends, the Court of Appeals reversed the decree of the District Court which had sustained defendants' motion to dismiss for failure to state a cause of action, the Court of Appeals holding that the complaint states a cause of action and that the District Court should have permitted the plaintiffs to file certain tendered amendments to the complaint (R. 357-363, 364). This second cause of action, therefore, is not involved in this petition for certiorari.

The cause of action involved in this petition for certiorari is that relating to the liability of the directors for inducing and causing the pledging of the assets of I.U.I. to certain banks in violation of the debenture covenants. In respect to that cause of action, the District Court entered a decree (R. 320) on March 8, 1940 sustaining a motion by defendants for summary judgment under Rule 56 of the Rules of Civil Procedure predicated on the alleged ground that by a so-called settlement of separate litigation by the debenture holders against the pledgee-banks, in which litigation the debenture holders sought to establish equitable rights in the pledged assets, the debenture holders, in effect, released the bank pledgees and that such release operated to release the directors (defendants here) of all liability in connection with their having induced such pledges (R. 74). The Court of Appeals affirmed the decree in that respect (R. 352-357, 364) and it is to that portion of the decree that this petition for writ of certiorari is addressed.

The Essential Facts.

I.U.I. was organized as an investment company in the latter part of 1928 by Samuel Insull (since deceased) and the defendants, who became its directors (R. 3-5). The publicly stated purpose of I.U.I. was to acquire and hold large share-holdings in the major utility companies of the Insull group, which were also under the direction and management of the defendants and in which they had large financial interests (R. 3-5). The defendants caused I.U.I. to issue and sell to the public shortly after its organization two series of long term unsecured debentures, aggregating $66,000,000, in denominations of $1,000 each (R. 6, 12, 16). The debentures contained certain covenants for the benefit and protection of the debenture holders, the one of principal importance here being as follows:

> "The Company hereby covenants and agrees with the holder hereof that so long as this debenture shall be outstanding and provision for the payment thereof shall not have been made, it will not mortgage or pledge any of its property unless the instrument creating such mortgage or pledge shall provide that this debenture shall be secured thereby equally and ratable with all other obligations issued or to be issued thereunder, * * *." (R. 8, 14.)

These debentures were purchased by the public, including plaintiffs, in reliance upon representations made by the defendants in public reports and offering circulars, representing the nature and purpose of the company and the relationship of the defendant-directors to the other Insull companies whose securities were to be acquired and held as aforesaid, and the further representations that the holders of debentures would be protected by said covenant and that the proceeds of the financing would enable I.U.I. to pay all existing indebtedness and leave a substantial cash balance, about $19,500,000 (R. 4, 5, 16-19, 106, 256-262).

Shortly after I.U.I. was organized, the defendant-directors caused I.U.I. to pledge substantially all its assets (securities of the Insull group) to secure loans from various banks in Chicago and New York and General Electric Co. aggregating $75,000,000 (R. 24-32) of which about $45,000,000 remained unpaid when I.U.I. went into bankruptcy in 1932, at which time its unpledged assets consisted only of some $1,700,000 of securities and cash (R. 96, par. 18). Inasmuch as none of the pledges to the banks provided for the equal and ratable security of the debentures, the defendant-directors, in causing said pledges to be made, induced the violation of the debenture covenants (R. 24-33).

After I.U.I. went into bankruptcy, the debenture holders filed two sets of suits, one against the banks and the other is this suit. These suits were filed in behalf of owners of over $57,000,000 of outstanding debentures (R. 6, 12). The suits against the banks charged that the banks had knowledge of the debenture covenants at the time they received the assets of I.U.I. in pledge and the relief sought was a decree requiring the banks to share their security with the debenture holders as required by the covenant (R. 86-114, 124). The suits against the New York banks were tried in the District Court at New York and resulted in decrees of dismissal. (*Celia Kelly* v. *Central Hanover Bank & Trust Co., et al.*, 11 F. Supp. 497.) That court found, among other things (page 510), that the banks were charged neither with fraud nor with inducing the breach of covenant. On appeal these cases were remanded by the Circuit Court of Appeals for the Second Circuit for further findings of facts (85 F. (2d) 61, as modified by Order of July 17, 1936 (R. 121, 463).

Negotiations were thereupon entered into as a result of which both the New York and Chicago litigation against the banks was terminated, in consideration, among other things, of a sum equal to 10% of the then value of the collateral to be paid by the banks into the District Court at Chi-

cago for the benefit of the debenture holders, which amounted to $3,435,088.07 (R. 136-138, 232-238). It was distinctly intended and agreed by the banks and the representatives of the debenture holders that this cause of action against the directors of I.U.I. should not be released or affected by the so-called settlement with the banks (R. 235-238), and the settlement agreement was made subject to the approval of the District Court at Chicago after notice to debenture holders of all its terms and a public hearing (R. 238-239, 143, 144, 148-162). This so-called settlement agreement did not take the form of an instrument of release but was embodied in a petition by the debenture holders to the District Court at Chicago, the answer of the Chicago banks and the findings of facts, conclusions of law, decree and orders entered by said court (R. 115-199) which approved the settlement as fair and equitable on the terms and conditions therein set forth (R. 170, 171, 173), one of the terms being that the cause of action of the debenture holders against the directors would not be released or affected by the settlement. This reservation clause reads as follows (R. 143, 166):

> K. Nothing in the agreement of settlement and compromise contained, or referred to therein, to be construed to operate as a release or to affect any causes of action, claims or demands held by the said complainants in said Chicago and New York equity suits or by said Bigelow as Trustee, or by the holders of said Insull Utility Investments, Inc., Series A or B Debentures, or any other creditors of said Insull Utility Investments, Inc., against any person, firm or corporation other than any party to the settlement and compromise by name or reference and any officer, director, agent or employee of such party who is not or has not also been an officer or director of said Insull Utility Investments, Inc.

The various findings and orders in connection with the approval of said settlement were entered by District Judge

Wilkerson before whom the instant case was then and had been pending for several years (R. 56-65).

After the so-called settlement with the banks was consummated, the directors (defendants here) filed their above-described motion for summary judgment under Rule 56 of the Rules of Civil Procedure, attaching thereto copies of said papers filed in connection with the approval of the bank settlement, which included said reservation clause, and claimed thereby that the settlement with the banks operated to release the directors (R. 74-195). The plaintiffs filed an answer (R. 229-241), the allegations of which were admitted by defendants (R. 279, 281, 289), in which it was alleged that the reservation clause was inserted in the settlement papers with the banks for the reason that it was the purpose and intention of the plaintiffs and the banks not to release the directors and that the agreement with the banks was no more than a covenant not to sue. The plaintiffs' answer further alleged that the payment by the banks and all the dividends paid to the debenture holders by the bankrupt estate of I.U.I. yielded less than 10% of the principal amount of debentures and that the payment by the banks to the debenture holders did not constitute nor was it paid or received as full satisfaction of the injuries sustained by the debenture holders as the result of the bank pledges in violation of the debenture covenants (R. 238-240).

The District Court sustained the defendants' motion for summary judgment (R. 320) and this was affirmed by the Court of Appeals (R. 364). In its opinion (R. 352) the Court of Appeals recognized that under the Illinois rule in contract cases the release of one joint obligor, coupled with a reservation of the cause of action against the other joint obligors, does not operate to release the other obligors, but the Court said that "strange though it may seem, the Illinois courts have not seen fit to extend this wholesome and common sense formula to the tort cases." The Court

of Appeals stated that the "superior view" is that the other joint tort-feasors are not released but felt that the "harsh" and "technical" rule (that words of release override and are paramount to other words used by the parties expressing the contrary intention not to release and to regard the entire transaction as no more than a covenant not to sue) was followed in Illinois in tort cases and must be applied by it (R. 355-357).

The plaintiffs filed a petition for rehearing in the Court of Appeals on the ground that the Court of Appeals misapprehended the Illinois law, that no case in Illinois has refused to extend the wholesome and common sense formula used in contract cases to tort cases and that in no case have the Illinois courts decided that the release of one joint tort-feasor, coupled with an express reservation of the cause of action against the other tort-feasors, constitutes a release of the other tort-feasors (R. 365). This petition for rehearing was denied without opinion (R. 461).

Jurisdiction of This Court to Review the Decree in Question.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (28 U. S. C. A. Section 347). The decree which the petitioners seek to have reviewed was entered by the Circuit Court of Appeals of the Seventh Circuit, on August 22, 1941 (R. 364). The opinion is reported in 122 F. (2d) 746 and appears in the record (R. 352). Petitions for rehearing were denied October 1, 1941 (R. 461).

The Questions Presented.

1. Inasmuch as the so-called settlement with the banks, which was made in Illinois, expressly reserved the cause of action by the debenture holders against the defendants,

should not the Court of Appeals have held that the defendants were not released in view of the Illinois rule that a release of one jointly liable, with a reservation of the cause of action against the others jointly liable, does not release the others?

2. In the absence of a decision by the state courts on the question of local law as to the effect of a reservation clause in a release of joint tort-feasors, should not the Circuit Court of Appeals, in view of decisions by the state courts giving effect to reservation clauses in releases of joint contractual liability, have applied the local law, especially when the Circuit Court of Appeals recognized that the local rule applied in those cases was common sense and wholesome and saw no reason for any distinction in the application of the rule to all releases with such express reservations, whether the liability was in contract or in tort?

3. In the absence of decisions by the state courts on a question of local law, should not the Circuit Court of Appeals have followed the rule adopted in other states and the Restatement of the Law of Torts and which it recognizes as a wholesome and common sense rule rather than the rule which it considered "harsh" and "technical" and which ignores the intention of the parties?

4. Were the banks by the acceptance of the assets in pledge with knowledge of the violation of the debenture covenants, but without any fraud and without inducing the breach of the covenants, liable as tort-feasors or were they merely liable in equity to account to the debenture holders for their equal and ratable security in the pledged assets?

5. By inducing I.U.I. to breach the covenants in favor of the plaintiffs by pledging substantially all of the assets of I.U.I. to the banks in violation of the debenture covenants, were the defendants liable as ordinary tort-feasors,

or in view of the nature of the company and the circumstances under which the debentures were sold, were they liable as trustees? Should the defendants, as trustees in the situation disclosed by this suit, be entitled to avail themselves of the alleged rule that the release of one joint tort-feasor releases all?

6. Is it true that the defendant-directors and the Chicago and New York bank-pledgees were *jointly* liable for the same wrong so that there could be invoked the alleged rule that the release of one joint tort-feasor releases the others?

7. Inasmuch as the cause of action of the debenture holders against the New York banks had been extinguished by judgments having been entered for the banks in the suits brought against them by the debenture holders and the debenture holders could do no more than appeal from such judgments, the plaintiffs, at the time of their so-called settlement with the banks, had no cause of action against the New York banks. In view of the fact that the debenture holders had no cause of action against the New York banks and could and did agree to do no more than dismiss their pending appeals, did the Court of Appeals properly invoke the alleged rule in respect to the cause of action for wrongful pledges to the New York banks?

8. Should the District Court have considered this matter, over the objections of the plaintiffs, on a motion for summary judgment under Rule 56 of the Rules of Civil Procedure despite the fact that the plaintiffs had demanded a jury trial on questions triable by a jury and the intention of the parties was an important factual issue? (See R. 239, 264, 279-281, 289.)

9. Should the plaintiffs be barred from prosecuting their cause of action against the defendants when it is clear that whatever payments the plaintiffs have received from the Chicago and New York banks and all other

sources do not satisfy the cause of action by the plaintiffs against the defendants and constitute payment of less than ten per centum of the principal amount of the debentures? Should the debenture holders be precluded from maintaining this suit against the defendant-directors when the amount of money which they received from the Chicago and New York banks did not compensate them in full for their damages nor was it accepted as full compensation?

10. The holding of the Court of Appeals vitiates the acts of the District Court in connection with the approval of the settlement and deprives the debenture holders of the benefit of the reservation, which was a condition precedent to the settlement and an inducement to them to consent and to the District Court to approve the settlement as fair and equitable. The Court of Appeals should have given effect to the reservation, leaving the defendants to benefit from the settlement only to the extent that it reduces the amount of damages for which they are liable, as was intended by the settling parties, including the District Court.

Reasons for the Allowance of the Writ.

1. The Court of Appeals has decided an extremely important question of local law in conflict with applicable local decisions. In construing releases the Illinois courts follow the cardinal rule of construction that written instruments must be so construed as to carry out the intention of the parties. Since 1867, all Illinois cases involving the question have without exception decided that whenever a release, even though using words of release as to the releasee, also contains language manifesting an intent to preserve the releasor's rights against others jointly liable, such manifestation must be given effect and this is done by treating the release as if it were only a covenant not

to sue the releasee, leaving the cause of action against the others unimpaired:

Parmelee v. *Lawrence,* 44 Ill. 405.
City of Chicago v. *Babcock,* 143 Ill. 358, 367.
Dupee v. *Blake,* 148 Ill. 453, 465.
Moore v. *Stanwood,* 98 Ill. 605, 608.
Mueller v. *Dobschuetz,* 89 Ill. 176.
Lumberman's Ins. Co. v. *Preble,* 50 Ill. 332, 335.
Forster v. *Sheridan Trust & Savings Bank,* 257 Ill. App. 463, 472.
Van Meter v. *Gurney,* 251 Ill. App. 184, 186.
Rice v. *Barkman,* 249 Ill. App. 127, 130.
Wallace v. *Armstrong,* 236 Ill. App. 457, 460.
Nixon v. *City of Chicago,* 212 Ill. App. 365, 387.
Miller v. *Lloyd,* 181 Ill. App. 230, 246.
Nickerson v. *Suplee,* 174 Ill. App. 136, 139.
Skinner v. *Sullivan,* 127 Ill. App. 657, 663.
Clark v. *Mallory,* 83 Ill. App. 488, aff'd 185 Ill. 227.
Thomason v. *Clark,* 31 Ill. App. 404, 407.

The Court of Appeals recognized that this is the Illinois rule in contract cases, but stated that "strange though it may seem, the Illinois courts have not seen fit to extend this wholesome and common sense formula to tort cases", and added that it failed "to see a good reason for drawing this distinction between joint tort-feasor cases and joint debtor cases * * * but we must accept the limitation fixed by the Illinois courts." The Circuit Court of Appeals cited no case to support such a limitation, relying only on three cases which involve the effect of a release of joint tort-feasors where there was no expressed intention to reserve the cause of action against others. In our petition for rehearing filed in the Court of Appeals we challenged defendants to cite a single case in Illinois supporting the distinction made by the Court of Appeals and deciding that in spite of a clause in a release preserving

the cause of action against the other joint tort-feasors, the reservation clause will be given no effect and the other joint tort-feasors will be released. The defendants answered the petition for rehearing but were unable to cite a single case to meet this challenge.

2. Even assuming that the Illinois courts have not decided the question as to whether the release of one joint tort-feasor, with a reservation against the other tort-feasors, does or does not operate to release the other joint tort-feasors, and that therefore it was necessary for the Circuit Court of Appeals to fill the gap, the Court of Appeals should have filled the supposed gap by applying the rule followed in Illinois in contract cases which it found to be analogous and which it recognized as the "superior view" and the "wholesome and common sense formula" (and which is also the prevailing rule in tort cases followed by the other state courts and adopted by the Restatement of the Law of Torts) rather than the supposed rule that in tort cases in Illinois such reservations are disregarded, which the Court of Appeals admitted was "harsh" and "technical."

If the point here involved were presented to the Illinois courts, they would unquestionably hold that the rule in *Parmelee* v. *Lawrence*, 44 Ill. 405, applied to tort cases. This is indicated in *City* v. *Babcock*, 143 Ill. 358, and *Van Meter* v. *Gurney*, 251 Ill. App. 184, both of which involve tort liabilities.

3. The Court of Appeals has decided an important question of local law, namely, that the defendants are not liable as trustees to the debenture holders but as ordinary tort-feasors, which decision is in conflict with applicable local decisions:

Delano v. *Case*, 121 Ill. 247.

Chicago Title & Trust Company v. *Munday*, 297 Ill. 555, 562.

Albers v. *Sullivan*, 287 Ill. App. 461, 465-7.

The decision of the Court of Appeals on this point is also in conflict with the decisions of this Court, other Circuit Courts of Appeal and other state courts:

Jackson v. *Ludeling*, 88 U. S. 616.
Boyd v. *Schneider*, 131 Fed. 223 (C. C. A. 7).
Strauss v. *United States Fidelity & Guaranty Co.*, 63 Fed. (2) 174, 179 (C. C. A. 4).
Davis v. *Virginia Ry. & Power Co.*, 229 Fed. 633 (C. C. A. 4).
Whitford v. *Moehlenpah*, 196 Wis. 10.
Lynch v. *Conger*, 168 N. Y. Supp. 855, 858, affirmed 229 N. Y. 543.
Belden v. *Burke*, 25 N. Y. Supp. 601.
Wells v. *Carlsen*, 130 Neb. 773, 266 N. W. 618.

4. The decision of the Court of Appeals that the bank pledgees were tort-feasors in accepting the pledges from I.U.I. is in direct conflict with the findings of the District Court in the litigation against the banks concerning the same pledges here involved (*Kelly* v. *Central Hanover Bank & Trust Co.*, 11 Fed. Supp. 497) and of the Circuit Court of Appeals on review thereof (85 Fed. (2d) 61), as modified (R. 463).

Judge Mack in his opinion, in describing the suits against the banks, found (pp. 500, 510):

> "Plaintiff asks, on behalf of herself and all other debenture holders and for their benefit, that stock pledged to defendants by I.U.I. as collateral to certain loans made by each of them in 1931, be returned or that the debenture holders share equally and ratably with those defendants in such securities. * * * defendants are charged neither with actual fraud nor with inducing a breach of contract."

The Circuit Court of Appeals for the Second Circuit said, in describing the suits against the bank, stated (p. 62):

> "A debenture bondholder, Kelly, brought a representative suit against all the lenders jointly and against

each bank individually, praying that the pledgees be ordered to surrender the property pledged and that she be decreed to have a superior lien on such pledged property."

It therefore appears that the liability of the banks, if any, which was the subject of the settlement was *ex contractu*, involving only an obligation to share the securities as required by the debenture covenants, and not in tort. Cases in Illinois and in other jurisdictions demonstrate that the liability of the banks, if any, was of a contractual nature and not in tort and that a release of one liable in contract does not discharge the liability of the other who was liable in tort, even though his wrongful act initiated the transaction:

Barnes v. *Barnett*, 188 Ill. App. 32.

Dougherty v. *California Kettleman Oil Royalties*, 13 Calif. (2) 174, 88 P. (2d) 690 (1939).

Flannery v. *Flannery Bolt Co.*, 108 Fed. (2) 531, (C. C. A. 3, 1940) cert. denied, 60 S. Ct. 615.

Arkansas National Bank v. *Martin*, 110 Ark. 578, 163 S. W. 795 (1914).

See: *Connecticut Company* v. *New York, N. H. and H. R. Co.*, 94 Conn. 13, 107 Atl. 646; and *Chase Nat. Bank* v. *Sweezy*, 281 N. Y. S. 487.

5. The decision of the Circuit Court of Appeals that the defendant-directors and the banks were *jointly* liable as tort-feasors is in conflict with the local law and the decisions of this Court and other courts that even though the acts of two parties contribute to an injury, they will not be deemed joint tort-feasors under the technical rule of release in the event that their liability arises from different grounds and on different theories:

Veazie v. *Williams*, 8 How. (U. S.) 134.

Scharfenstein v. *Forest City Knitting Co.*, 253 Ill. App. 190, 202 (certiorari denied by Illinois Supreme Court, 254 Ill. App. xviii).

People v. *Becker*, 253 Ill. 131.
Dougherty v. *Calif. Kettleman Oil R. Inc.*, 13 Calif. (2) 174.
Young v. *Anderson*, 33 Idaho 522.
Pittsburgh Rys. Co. v. *Chapman*, 145 Fed. 886 (C. C. A. 3).

6. The decision of the Court of Appeals decided an important question of local law, namely, that the debenture holders released their cause of action against the defendants for the wrongful pledges to the New York banks at the time when they entered into the so-called settlement with the New York banks even though, at that time, the debenture holders had no cause of action whatsoever against the New York banks because of the judgments entered in the bank suits in favor of the New York banks. This decision is in direct conflict with the local decisions (*Van Meter* v. *Gurney*, 251 Ill. App. 184).

7. It would be in the interest of the proper administration of justice to grant a writ of certiorari in this suit in order to correct a plainly untenable and erroneous decision based on undisputed facts. The so-called settlement between the debenture holders and the banks was consummated under the supervision and with the approval of the District Court at Chicago having jurisdiction of the bankruptcy case of I.U.I., the suits against the banks and this suit. The decision of the Court of Appeals frustrates and negatives the decree approving the so-called settlement with the banks, which decree was entered on the express condition that the cause of action against the defendants would be reserved for the benefit of the thousands of debenture holders scattered throughout the country.

The questions presented by this petition are of great public importance both in this suit and to correct the Court of Appeals' conception of the Illinois law on a principle of

law which is applicable to situations which arise with great frequency.

WHEREFORE, your petitioner prays that the Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals, for the Seventh Circuit, commanding that Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this cause to the end that this cause, insofar as it involves the summary judgment barring the plaintiffs from maintaining the cause of action against directors for having induced the wrongful pledging of assets, may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals affirming said summary judgment be reversed; and that the decree of the District Court insofar as it allows said summary judgment be set aside; and that your petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

THOMAS D. AIKEN, TILLIE DAVENPORT, LILLIAN H. ESSIG, PAUL FETCHENEROWSKI, ELLA A. GALLAGHER, JOHN WILLIAM HAM, E. MORTON INGRAHAM, IDA L. JAMES, JUNEA W. KELLY, PETER J. MCARRON, JOHN W. OSBORN, AUGUST H. PETERSON, VICTOR A. RASMUSSEN, GUS H. TESSMAN, C. J. UNGS, JEFFERSON D. WALTERS, JOHN P. YOUNG, FRANK S. PIPER, CHARLES P. BECKER AND BERTHA D. WILLIAMS,

By: EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
ROGER Q. WHITE,
Counsel for Plaintiffs-Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

THOMAS D. AIKEN, TILLIE DAVENPORT, LILLIAN H. ESSIG, PAUL FETCHENEROWSKI, ELLA A. GALLAGHER, JOHN WILLIAM HAM, E. MORTON INGRAHAM, ADA L. JAMES, JUNEA W. KELLY, PETER J. McARRON, JOHN W. OSBORN, AUGUST H. PETERSON, VICTOR A. RASMUSSEN, GUS H. TESSMAN, C. J. UNGS, JEFFERSON D. WALTERS, JOHN P. YOUNG, FRANK S. PIPER, CHARLES P. BECKER AND BERTHA D. WILLIAMS,

Plaintiffs-Petitioners,

vs.

SAMUEL INSULL, JR., PHILIP J. McENROE, JOHN F. GILCHRIST, EDWARD J. DOYLE, JOHN G. GULICK, GEORGE F. MITCHELL, MARSHALL E. SAMPSELL, STUYVESANT PEABODY AND HARRY L. STUART,

Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The District Court for the Northern District of Illinois, Eastern Division, filed on January 31, 1940, a Memoranda of Holdings (not reported) (R. 290).

The opinion of the Court of Appeals for the Seventh

Circuit was filed on August 22, 1941 and is reported in 122 Fed. (2d) 746. It also appears in the record herein (R. 352).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by an Act of February 13, 1925, c. 229 (28 U. S. C. A. Sec. 347). The decree of the Court of Appeals which petitioner seeks to have reviewed was entered August 22, 1941 (R. 364). Petitions for Rehearing were denied on October 1, 1941 without opinion (R. 461).

STATEMENT OF THE CASE.

The important facts necessary to an understanding of the issues argued in this brief are set forth in the foregoing Petition for Writ of Certiorari under the heading "Statement of the Matters Involved" and the statement therein contained is hereby made a part hereof.

SPECIFICATIONS OF ERRORS.

The lower courts erred in sustaining defendants' motion for summary judgment in respect to the cause of action based on the wrongful pledges to certain banks of the assets of I.U.I.

The Circuit Court of Appeals erred in holding that the Illinois courts have in tort cases refused to apply the rule universally followed in Illinois in contract cases, namely, that the court will give effect to language of a release manifesting an intent to preserve the cause of action against others jointly liable, and in holding that in Illinois such rule is limited to contract cases.

If this Court should grant the prayer of this Petition for Writ of Certiorari, petitioner intends to urge as additional errors the other findings, conclusions, rulings and orders of the lower courts which are adverse to the plaintiffs in regard to the matters and questions set forth in the foregoing Petition under the heading "The Questions Presented" (*ante*, pp. 7-10).

ARGUMENT.

I.

Under Illinois Law the So-Called Settlement by the Debenture Holders With the Pledgee-Banks Coupled With the Reservation of the Cause of Action by the Debenture Holders Against the Defendants Did Not Operate to Release the Defendants.

The decision of the Court of Appeals on this important cause of action is based on a misapprehension of Illinois law and is in conflict with applicable local decisions. The Court of Appeals said (R. 352, 355):

> "They (the defendants) rely on the strict common law principle that a release to one of several joint tort-feasors is a release to all, irrespective of the intent. Unquestionably this technical rule of release, as applied to joint wrongdoers, is followed in Illinois. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148; *Gilbert* v. *St. Louis, S. & P. R. R.*, 220 Ill. App. 51; *Stanley* v. *Leahy*, 87 Ill. App. 465."

Later in this brief (*post*, pp. 27 to 30), we shall point out that the court misapprehended the holdings of the three cases cited by it and that those cases are not germane.

The opinion proceeds (R. 356):

> "We take it, however, that the harsh rule as to a release of one joint tort-feasor does not prevail in the contract cases. *Parmelee* v. *Lawrence*, 44 Ill. 405; *Nickerson* v. *Suplee*, 174 Ill. App. 136. According to the Parmelee formula, if there is language in the release of a joint debtor manifesting an intent to preserve the releasor's rights against the other co-obligors, effect is given to this manifestation. Strange though it may seem, the Illinois courts have not seen fit to extend this wholesome and commen sense formula to the tort cases. We fail to see a good reason for

drawing this distinction between joint tort-feasor cases and joint debtor cases, compare *Brown* v. *City of Cambridge,* 85 Mass. 474, 477, but we must accept the limitation fixed by the Illinois courts."

The Court of Appeals further said (p. 752):

"We need only add, on the strength of our case-law analysis made earlier in the opinion, that the Parmelee formula is not applicable in tort cases. Hence, we are compelled to conclude, as did the District Court, that the reservation of the cause of action against the former directors of I.U.I. was void because repugnant to the operation of the release. We believe, as do the plaintiffs, that Section 885 of the Restatement of the Law of Torts (1939), which has modified the Illinois rule of release, is the superior view in these matters, but our task is to apply the local law, not the Restatement."

There was no need for the Court of Appeals to apply an admittedly "harsh," "technical" rule to this case. The rule which the Court of Appeals felt compelled to apply to this case is not the Illinois rule. There is no Illinois case holding that a release to one of several joint tort-feasors is a release of all, when there is express reservation by the releasor of his cause of action against the other tort-feasors.

The leading case on the subject in Illinois is that of *Parmelee* v. *Lawrence,* 44 Ill. 405, decided in 1867. The instrument involved in that case recited that Lawrence had received a certain amount of money from Bigelow, one of four joint obligors, "in full payment of his portion of all money due me" (p. 408), and it further stated:

"and I release and discharge said Bigelow, his property and estate, from all claims on account of the same."

It then provided (p. 408):

"Nothing herein contained shall in any wise affect my rights or demand against said Parmelee, Gage or Johnson, or their interest in said property."

The court considered the earlier Illinois cases of *Benjamin* v. *McConnell, et al.*, 4 Gilman 536, and *Rice* v. *Webster*, 18 Ill. 331, which involved the construction of instruments similar to the one in *Parmelee* v. *Lawrence*. In both of those cases, it was held that the instruments should be construed to release the others jointly liable, and that the words of reservation were repugnant to the release. The court in *Parmelee* v. *Lawrence*, 44 Ill. 405, overruled those cases and said (p. 413):

> "We would further add that the weight of the modern authorities is against these cases, and in favor of the more reasonable rule, that where the release of one of several obligors shows upon its face, and in connection with the surrounding circumstances, that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue."

Parmelee v. *Lawrence* has been cited and approved in many other jurisdictions. Without any exception or limitation whatever, it has been universally followed in all Illinois cases involving releases containing reservations as to others jointly liable, as appears in the following Illinois cases:

City of Chicago v. *Babcock*, 143 Ill. 358, 367.
Dupee v. *Blake*, 148 Ill. 453, 465.
Moore v. *Stanwood*, 98 Ill. 605, 608.
Mueller v. *Dobschuetz*, 89 Ill. 176.
Lumberman's Ins. Co. v. *Preble*, 50 Ill. 332, 335.
Forster v. *Sheridan Trust & Savings Bank*, 257 Ill. App. 463, 472.
Van Meter v. *Gurney*, 251 Ill. App. 184, 186.
Rice v. *Barkman*, 249 Ill. App. 127, 130.
Wallace v. *Armstrong*, 236 Ill. App. 457, 460.
Nixon v. *City of Chicago*, 212 Ill. App. 365, 387.
Miller v. *Lloyd*, 181 Ill. App. 230, 246.

Nickerson v. *Suplee*, 174 Ill. App. 136, 139.
Skinner v. *Sullivan*, 127 Ill. App. 657, 663.
Clark v. *Mallory*, 83 Ill. App. 488, 492, aff'd. 185 Ill. 227.
Thomason v. *Clark*, 31 Ill. App. 404, 407.

That the Illinois courts follow the same rule of determining the intention of the parties in regard to releases given in tort cases is made clear by *City of Chicago* v. *Babcock*, 143 Ill. 358, in which it appeared that the plaintiff was injured by reason of a defective sidewalk under circumstances making the City and LeCardi joint tort-feasors. The City claimed that when plaintiff gave to LeCardi an instrument reciting (p. 364):

> "that no action shall be begun against Joseph LeCardi, by reason of any matters existing at this date, by the undersigned. Given for good consideration,"

she received the money mentioned in the instrument in full satisfaction of her cause of action against LeCardi, and that thereby the suit against the City was barred. The trial court submitted to the jury the question as to whether the $150 was received by the plaintiff in satisfaction of her injuries and instructed the jury that if they should find that it was so received by her, then their verdict should be for the City. The verdict was for the plaintiff.

The Supreme Court said (p. 366):

> "It is thus seen that it was fairly left to the jury to determine, as a question of fact, whether or not the money received by appellee was received by her in satisfaction of the injuries that she had sustained."

The court, after citing the Illinois case of *Parmelee* v. *Lawrence* and other cases holding that the intention of the parties controls, concluded that there was no error in law in view of the fact that (p. 367):

> "the question whether there was an accord and satisfaction, and whether the $150 was paid and received in

> satisfaction of damages, was submitted to the jury, to be determined by them in the light of all the facts and circumstances shown by the evidence."

In other words, in line with *Parmelee* v. *Lawrence*, 44 Ill. 405, the court held that in this suit, involving joint tort-feasors, the sole question to be determined was the intention of LeCardi and the plaintiff.

That the technical rule of release should not be extended is stated in *Moore* v. *Stanwood*, 98 Ill. 605, 608:

> "This court, in *Parmelee* v. *Lawrence*, 44 Ill. 405, held that the technical rule by which a release of one joint debtor is made to operate as a discharge of all, is not to be extended to cases not within the reason and equity of the rule."

The court in *Clark* v. *Mallory*, 83 Ill. App. 488, 492 (affirmed 185 Ill. 227), in referring to the rule expressed in *Parmelee* v. *Lawrence* and to a reservation in the instrument, said:

> "Where such right is reserved, the release will be construed as a covenant not to sue, leaving the liability of the co-obligors unimpaired."

The foregoing discussion should make it clear that the Court of Appeals misapprehended the Illinois law and that the so-called release of the banks did not release the defendants.

However, if it should be believed that because the Illinois courts have never decided, one way or another, the effect of a so-called release with reservation clause in tort cases and that therefore the Circuit Court of Appeals was called upon to fill the gap, then the Court of Appeals should have applied what it recognized as the Illinois rule in contract cases, which it found to be completely analogous, and which it considered to be the general and superior view adopted by other jurisdictions and by the Restatement of the Law of Torts. An excellent discussion of this proposition is found in the opinion of the Court of Appeals

in this case (R. 352); the Court refused to follow the dictates of its conscience only because of its misapprehension of Illinois law, as above pointed out. That the Court of Appeals was correct in its understanding of what the general rule is in other jurisdictions is indicated by the following leading cases of other jurisdictions:

Gilbert v. *Finch*, 173 N. Y. 455, 66 N. E. 133.

Dwy v. *Connecticut*, 89 Conn. 74, 92 Atl. 883.

Carey v. *Bilby*, (C. C. A. 8) 129 Fed. 203.

Black v. *Martin*, 88 Mont. 256, 292 Pac. 577.

Colby v. *Walker*, 86 N. H. 568, 171 Atl. 774.

Carpenter v. *W. H. McElwain Company*, 78 N. H. 118, 120, 97 A. 560, 561.

Edens v. *Fletcher*, 79 Kans. 139, 98 Pac. 784.

Kropidlowski v. *Pfister & Vogel Leather Co.*, 149 Wis. 421, 135 N. W. 839.

Duck v. *Mayeu*, 2 Law Rep. Queen's Bench Div. 511, 513.

Adams Express Co. v. *Beckwith*, 100 Ohio St. 348, 126 N. E. 300.

Feighley v. *C. Hoffman & Son Milling Co.*, 100 Kan. 430, 165 Pac. 276.

City of Topeka v. *Brooks*, 99 Kan. 643, 164 Pac. 285.

El Paso & S. R. Co. v. *Darr*, 93 S. W. 166.

Pennington v. *Bevering*, 9 S. W. (2d) 401.

Bland v. *Lawyer-Cuff Co.*, 72 Okla. 128, 178 Pac. 885 (1919).

Mahaffey v. *Glover*, 184 Ark. 1159, 45 S. W. (2d) 521.

Roseville Trust Co. v. *Mott*, 85 N. J. Eq. 297, 96 Atl. 402.

LaMonte v. *Lurich*, (N. J.) 100 Atl. 1031.

Greenhalch v. *Shell Oil Co.*, 78 F. (2d) 942 (C. C. A. 10).

See also:

25 California Law Review 413 (1937).
13 Cornell Law Quarterly 473 (1928).
22 Minnesota Law Review 692 (1938).
Mich. Section 1 (Suppl. Mich. L. Rev.) 23 (1935).
34 Harvard Law Review 442 (1921).

The Restatement of Torts (1939) Section 885, referred to by the Court of Appeals with approval, states the rule as follows:

> "(1) A valid release of one tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document."

In its "Comment" on this rule, the Restatement states, in referring to the earlier common law rule that a release of one joint tort-feasor discharges the others irrespective of the intent of the parties, as follows:

> "It frequently resulted in the unintended and unpaid-for discharge of one of the tort-feasors. The rule is not consistent with the modern American point of view."

The Restatement goes on to state:

> "Furthermore the tendency is to give effect to the intent of the parties to a transaction rather than to regard as controlling the formalities with which the transaction is executed. The law has now developed so that it is possible to carry out the intent of the parties as expressed in the document by which the release is given. * * *
>
> If, however, there is language in the release which manifests that the releasor intended to preserve his rights against the others, effect is given to this manifestation."

In our petition for rehearing filed in the Court of Appeals we challenged the defendants to cite a single case

of the Supreme or Appellate Courts of Illinois deciding that in spite of a clause in a release reserving the cause of action against the other joint tort-feasors, the reservation clause will be given no effect and the other joint tort-feasors will be released, and we now repeat that challenge. The defendants answered our petition for rehearing but were unable to meet our challenge.

We are certain that no case can be found to support the rule which the Court of Appeals believed is followed in the courts of the State of Illinois.

Not a single one of the three cases cited by the Court of Appeals in support of the alleged Illinois rule is in point. While the subject of "intention" may, in one way or another, be involved in these cases, in no case did the facts disclose an expressed intention by the releasor and releasee or an agreement between them to reserve the releasor's cause of action against the other joint tort-feasors—which facts are found in this case.

In the first case cited by the Court of Appeals, *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, there was no reservation of the cause of action against the other joint tort-feasor and there was no written release. The facts concerning the alleged discharge of the defendant were disclosed during the examination of the plaintiff when he testified that he received $1,000.00 from the other joint tort-feasor and had no further claim against it. The Court said that "the only question presented on this appeal is whether there was an accord and satisfaction" between the plaintiff and the other tort-feasor (p. 150). That the court might have held otherwise if the plaintiff had been able to show that he reserved his cause of action against the defendant is indicated by the following language (p. 151):

> "If the facts of the payment and acceptance of this sum, the dismissal of the suit against the rail-

road company, and the statement of the defendant in error that he had no further claim against it, are capable of another construction, the burden of furnishing the explanation or qualification which would give them a different effect was upon the defendant in error."

In the second case cited by the Court of Appeals, *Gilbert* v. *St. Louis S. & P. R. R.*, 220 Ill. App. 51, the plaintiff did not reserve his cause of action against the defendant when he released the other joint tort-feasor. The release introduced in evidence was a release of both the defendant and the other joint tort-feasor but the plaintiff contended that the name of the defendant was not in it when he executed it. The court held that it made no difference whether or not the name of the defendant was included in the written release at the time of its execution because even though the defendant had not been specifically named as a releasee in the written release, the release of the other joint tort-feasor operated to release the defendant. The court simply applied the general rule applicable to unqualified releases. How can that case be determinative of the issue in this case in view of the fact that in that case there was no expressed reservation in any form of the plaintiff's cause of action against the other joint tort-feasor?

The last case cited on this point, *Stanley* v. *Leahy*, 87 Ill. App. 465, is likewise not germane. That case involved the sufficiency of a pleading in which the plaintiff claimed that when she released the other joint tort-feasor, she did not intend to release the defendants. There was nothing to indicate, however, that the plaintiff expressed or communicated to anyone in any way her intention not to release the defendants. Of course, so long as the plaintiff's intention was not communicated to the releasees and was not an expressed condition under which the payment was made, it could have no legal significance. That is

even the rule in the contract cases which follow the *Parmelee* formula (See *Clark* v. *Mallory*, 185 Ill. 227). Can *Stanley* v. *Leahy* be compared to our case in which it is perfectly clear that the plaintiffs and the banks, as well as the District Court approving the so-called settlement, definitely expressed their intention to reserve to the plaintiffs their cause of action against the defendants and the so-called settlement with the banks was made subject to that condition?

If the three cases relied upon by the Court of Appeals for its decision that the Illinois courts treat tort cases differently from contract cases had been contract cases, and accordingly within the scope of the *Parmelee* formula, they would have been decided in the same way as they were. In the absence of any expressed reservation as a part of the so-called release of the releasor's cause of action against the other persons jointly liable, the *Parmelee* rule is inapplicable, whether the case be in contract or tort. That demonstrates how different those three cases are from this one and how they cannot be said to indicate that the Illinois courts have refused to extend the *Parmelee* rule to tort cases. These three cases constitute the entire basis for the refusal of the Court of Appeals to follow the approved rule laid down in the *Parmelee* case. Since the Court erred in its interpretation of those cases, and was convinced that the *Parmlee* formula ought to apply, this Court should rectify the error.

A case frequently relied upon by defendants is that of *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, but this case was, in effect, overruled in *Van Meter* v. *Gurney*, 251 Ill. App. 184.

We reiterate that any cases which the defendants will cite in response to our challenge will be as little in point as the three cases relied on by the Court of Appeals and analyzed above. An Illinois case is not determina-

tive of this case unless its facts are similar to the facts in the instant case. We have perused every reported Illinois case on the subject and are certain that the Illinois courts have never been presented in a tort case with an instrument of release which included a reservation of the cause of action against the other tort-feasors. Inasmuch as no reservation clause has ever been a part of the facts in any Illinois case involving a release of tort liability, how can it be said that the Illinois courts have decided that such reservation clauses shall be given no effect in tort cases?

There is no basis for concluding that the Illinois rule in tort cases is any different from its rule in contract cases. There is no Illinois case holding that the principle of the *Parmelee* case is not applicable to tort cases or limiting the *Parmelee* rule to contract cases. A written release, settlement agreement or written accord and satisfaction, like every other written instrument, is subject to construction and one of the cardinal rules of construction is that written instruments must be so construed as to carry out the intention of the parties. There is no rule of law to the effect that written instruments executed in connection with tort cases should be construed without reference to the intention of the parties. In *Reams* v. *Janoski*, 268 Ill. App. 8, the court was faced with a simple unambiguous release, containing no reservation clause or any other language indicating an intention to reserve the cause of action against the defendant, and yet the court held that parol evidence could be introduced to show that the plaintiff and the other tort-feasor intended to enter into a covenant not to sue and to reserve the plaintiff's cause of action against the defendant.

If this point were presented to the Illinois courts, they would unquestionably hold that the *Parmelee* rule applied to tort cases. Hence, a grave injustice to the debenture

holders was committed by the Court of Appeals in failing to follow the applicable local decisions and in deciding this case on an admittedly "harsh" rule. We entreat this Court to correct the error and apply the "superior view" and the "wholesome and common sense formula" which has been adopted by the Illinois courts and which is the prevailing rule followed by the other state courts and adopted by the Restatement of the Law of Torts.

II.

By Virtue of the Fact That the Suits Against the New York Banks Had Resulted in Judgment for the Banks at the Time of the So-Called Settlement With the Banks, the Debenture Holders Had No Cause of Action Against the New York Banks at the Time of the So-Called Settlement and Hence, to the Extent of the Pledges to the New York Banks, There Was No Basis for Invocation of the Alleged Rule That the Release of the Cause of Action Against One Joint Tort-Feasor Releases the Entire Cause of Action.

Assuming, for the sake of argument only, that all other points on which we rely are held adversely to our contentions, our position is that in no event were the directors discharged from liability in connection with the pledges which they induced to be made to the New York banks and General Electric Co.

The Court of Appeals apparently overlooked and did not pass upon our argument that the alleged rule (that the release to one of several joint tort-feasors releases all, irrespective of an express clause reserving the cause of action against others), cannot be applicable in this case in respect to that portion of the cause of action relating to the pledges which were wrongfully made to the New York banks. At the time the so-called settlement with the banks

was made, the suits by the debenture holders against the New York banks arising out of the wrongful pledges had been dismissed by the District Court at New York and the alleged cause of action merged and extinguished in the decrees of dismissal. There remained no cause of action in the debenture holders which could be the subject of a release. All that the New York banks could obtain from the debenture holders was a dismissal of the appeal from the decree in favor of the banks and that was all that the plaintiffs agreed to or did furnish in the settlement papers (R. 143, 160, 167).

The Court of Appeals in this case observed that in the case of *Van Meter* v. *Gurney,* 251 Ill. App. 184, an exception was made in tort cases to what this Court understood the Illinois rule to be and pointed out that in that case the court justified the application of the *Parmelee* rule of construction to a release given to one of two joint tort-feasors after judgment on the theory that "the claim in tort is merged into the judgment which is a debt" (p. 187). The instant case, in respect to the cause of action for wrongful pledges with the New York banks, calls for the application of the same exception to the alleged rule because upon dismissal of the New York bank cases, the plaintiffs' claim in tort, if it be considered a claim in tort, was merged into the judgment and was thereby extinguished. While this point does not apply to the cause of action for the pledges to the Chicago banks, those cases never having been tried, it should be clear that the debenture holders, at the very least, have not released their cause of action against the defendants for the pledges to the New York banks.

III.

The Defendants and the Pledgee-Banks Were Not Joint Tort-Feasors in Connection With the Pledging of the Assets of I. U. I. and Consequently There Was No Basis for the Application of the Alleged Rule That the Release of One Joint Tort-Feasor Releases All.

Even assuming for the sake of argument that the causes of action against the defendants and the banks were in tort, there would be no grounds for the application of the supposed rule that the release of one joint tort-feasor releases all unless the defendants and banks were *joint* tort-feasors in respect to the wrongs complained of.

The statement of facts should make it clear that although the suits against the banks and defendants are based on substantially the same set of facts, the causes of action against each were of a different nature, the theories were different, the charges were different and the defenses are bound to be different. The ruling of the Court of Appeals on this point is in conflict not only with the decisions in the litigation against the banks but also with decisions of this Court and of the State of Illinois as well as those of other jurisdictions (See Petition, *ante*, pp. 13-15). The Court of Appeals disposes of the point by the following reasoning (R. 355):

> "In our view the banks have contributed substantial assistance to the directors in the production of the resulting tort. According to Illinois law, 'It is enough if they were both liable for the same injury,' *Chapin* v. *Chicago & E. I. R. Co.*, 18 Ill. App. 47, 50, and neither conspiracy nor concert of action is necessary. We agree with the District Court's expression that 'The joint action of each was necessary to the consummation of the wrong.'"

The only case relied upon by the Court of Appeals, that of *Chapin* v. *Chicago & E. I. R. Co.*, 18 Ill. App. 47, is not

applicable because the injury in that case clearly arose out of the joint negligence of both railroads.

A strictly analogous case is that of *Veazie* v. *Williams*, 49 U. S. 134, in which it appears that the owners of certain property being sold at auction instructed the auctioneer to puff the price by fictitious bids. In a suit by the purchaser against the owners for fraud, the owners claimed that they were released by virtue of an unqualified release given by the purchaser to the auctioneer. This Court, in refusing to discharge the owners, held that the owners and the auctioneer were not jointly liable even though the action of each was necessary for the consummation of the wrong. This court said (p. 159):

> "Again, in the present instance, there was no joint liability at law by the respondents and the auctioneer. Their accountability was separate and resting on different grounds; his on actual falsehood—theirs on the adoption of the benefits of it, and the accountability thus arising for it. The release of one, therefore, is not like the release of a joint contractor or joint trespasser, 1 Anstruther, 38. And in equity it may well be limited to the person released, and the person paying the consideration for it. Hopkins, 251, 334."

In *People* v. *Becker*, 253 Ill. 131, the State Auditor who wrongfully drew state warrants and the State Treasurer who wrongfully paid the warrants were held not to be joint tort-feasors, so that a release to the State Auditor did not release the State Treasurer. The court said on this point (p. 137):

> "It is next contended the Auditor and Treasurer were joint tort-feasors, and as the State had accepted the amount of the Pavey judgment from Pavey and his bondsmen and released Pavey, such release worked a discharge of the Becker estate, Becker having been a joint tort-feasor with Pavey. The Auditor and Treasurer were not joint tort-feasors. (*Whittemore* v. *People*, 227 Ill. 453.) Their acts were not joint acts. The wrongful act of Pavey was in drawing the warrants

> and the wrongful act of Becker was in paying them, and whatever liability the law attached to their several acts was a distinct and separate liability, which could be enforced against them, or them and their bondsmen separately."

In *Scharfenstein* v. *Forest City Knitting Co.*, 253 Ill. App. 190, 202 (cert. den. Ill. Sup. Ct.), it was held that the rule in respect to release of joint tort-feasors had no application where a release was given to an interstate railroad by which the deceased was employed when its liability was regulated by the Federal Employers' Liability Act and the subsequent suit was under the State Wrongful Death Statute against a local factory which contributed to the injury. The court pointed out that the liabilities arose under different laws, giving different rights and causes of action, and that the two tort-feasors could not have been joined in the same action under the Federal Act.

It should be evident that the wrongs committed by the banks and directors in connection with the pledges are distinct and separate. The directors caused I.U.I. to make the pledges, while the banks without any inducement or fraud received them under circumstances which imposed on them only a possible liability to share their security with the debenture holders. The directors owed a duty to the debenture holders, while the banks were strangers to the debenture holders. Although it took the action of both the directors and the banks to effect the pledges, it cannot be said that the pledges resulted in the commission of a joint tort by the directors and banks.

Conclusion.

We shall not extend this brief by arguing all the questions presented and reasons relied on for the issuance of the writ which are set forth in the foregoing petition. Sufficient has been said, we submit, to warrant the issuance

of the writ of certiorari to correct the errors made by the Court of Appeals in failing to adopt applicable local decisions and thereby in depriving the debenture holders of an important cause of action.

Respectfully submitted,

EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
ROGER Q. WHITE,
Counsel for Plaintiffs-Petitioners.

FILED
DEC 30 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 822

DE MET'S INCORPORATED,
Plaintiff-Petitioner,

AND

ROBERT E. WOOD,
Intervenor-Petitioner,

vs.

SAMUEL INSULL, JR., C. W. SILLS, H. L. STUART, STANLEY FIELD, EDWARD J. DOYLE, F. K. SHRADER AND JOHN H. GULICK,
Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDMUND D. ADCOCK,
33 North LaSalle Street,
Chicago, Illinois,
ROGER Q. WHITE,
120 South LaSalle Street,
Chicago, Illinois,
LEWIS F. JACOBSON,
33 North LaSalle Street,
Chicago, Illinois,
GEORGE F. CALLAGHAN,
105 W. Adams Street,
Chicago, Illinois,
ALBERT W. FROEHDE,
77 W. Washington Street,
Chicago, Illinois,
Counsel for Plaintiff-Petitioner and Intervenor-Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 150 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. .....

DE MET'S INCORPORATED,
Plaintiff-Petitioner,

AND

ROBERT E. WOOD,
Intervenor-Petitioner,

vs.

SAMUEL INSULL, JR., C. W. SILLS, H. L. STUART, STANLEY FIELD, EDWARD J. DOYLE, F. K. SHRADER AND JOHN H. GULICK,
Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement of the Matters Involved.

Simultaneously with the filing of this petition, there is being filed in this Court a petition for certiorari by the plaintiffs in the case of Thomas D. Aiken, *et al. vs.* Samuel Insull, *et al.*, designated as Case No. 7430 in the Circuit Court of Appeals for the Seventh Circuit. The case at bar was designated as Case No. 7431 in that court and the two cases were there heard jointly, the facts and legal questions being similar and related.

In No. 7431, the case at bar, the Circuit Court of Appeals filed an opinion on August 22, 1941 (R. 344) in which it adopted its opinion in No. 7430 (R. 347) as to the questions here involved. The opinion is reported in 122 F. (2d) 755. Likewise the two cases were heard together in the District Court and a joint Memoranda of Holdings was filed by the District Court on January 31, 1940 (R. 292). The two cases are similar and closely related in that both are suits against directors of related corporations, charging the same type of wrongful acts, the Aiken case being a suit against the directors of Insull Utility Investments, Inc., by the holders of debentures of that corporation, and the case at bar being a suit against the directors of Corporation Securities Company, by the holders of Serial Gold Notes of that company, which notes contained covenants against pledging of assets in substantially the same language as in the I.U.I. debentures. Some of the respondents here (Stuart and Insull, Jr.) were also directors of I.U.I. and are respondents in the Aiken case.

The complaint in this case makes substantially the same allegations as in the complaint involved in the Aiken case, except for differences as to names, dates and amounts.

Corporation Securities Company of Chicago was organized by Samuel Insull and the other defendants herein about October 5, 1929 as an investment company (R. 3). Its purposes were stated in public reports and circulars to be the same as those of I.U.I., which was referred to therein (R. 61), that is, to acquire and hold a substantial amount of securities of the companies in the Insull Group (R. 3-5). These reports and circulars are the same as those referred to in case No. 7430.

In September 1930 Corporation Securities Company of Chicago issued and sold to the public $31,500,000 par amount of Serial Gold Notes, of which there were outstanding in the hands of the public at the time of filing this

suit $23,233,000 (R. 6). The number of the holders of said notes is approximately 5,000 (R. 243).

These Serial Gold Notes were purchased by such holders in reliance upon the circulars (R. 67) issued by the defendants representing the purpose of the company, the relationship of the defendants to the companies in the Insull Group, the protection to Noteholders by reason of the covenant and the representation that the proceeds of financing would furnish sufficient funds to pay off all current indebtedness and acquire all securities contracted for and provide the company with a substantial cash sum, over $8,000,000 (R. 67-68).

The complaint charges that notwithstanding the covenants in the Serial Gold Notes, the defendants induced the corporation to make large loans from banks and to pledge substantially all of its assets as collateral therefor without securing the Serial Gold Notes equally and ratably with such loans and without securing them whatsoever (R. 10, 11).

On April 18, 1932, a petition in bankruptcy was filed against Corporation Securities Company and on September 22, 1932, it was adjudicated a bankrupt (R. 109). As of April 18, 1932, the loans from banks aggregated over $15,000,000 and the collateral pledged had a market value of about $12,000,000 and constituted about 99% of the total assets of the company (R. 8—Paragraph 15).

The motion of the defendants for summary judgment (R. 56) was based upon the same grounds as in the Aiken case. Similar class suits in behalf of the holders of Serial Gold Notes of Corporation Securities Company had been filed against the Chicago and New York banks, to whom the assets of the corporation had been pledged, charging that said banks had notice of the covenants in the Serial Gold Notes and praying for decrees whereby the holders of the Serial Gold Notes would share with the banks in said se-

curities equally and ratably as required by the covenants (R. 106-110). In defending those suits the banks contended, among other things, that they owed no duties or obligations to the Noteholders and that they had no notice of the provisions of the notes restricting pledging (R. 235).

None of the suits brought by the Noteholders of Corporation Securities Company against the banks was ever tried but after the decision of the Circuit Court of Appeals for the Second Circuit in the cases brought by the Debenture Holders of I.U.I. (*Kelly* v. *Central Hanover Bank & Trust Company, et al.*, 85 Fed. (2d) 61), the representatives of the Noteholders of Corporation Securities Company participated in the negotiations between the debenture holders of I.U.I. and the banks for the settlement of all litigation against the banks and the claims of both were included in that settlement (R. 125, 239-242).

Under the settlement the banks agreed to pay these noteholders $1,200,000 (R. 126), being 10% of the value of the pledged collateral on an agreed date (R. 241), with the same understanding and intention as stated in the Aiken case, that is, that said sum was partial payment only and that the cause of action herein against the directors of Corporation Securities Company should not be discharged or affected thereby (R. 239-241).

The settlement was presented to the court at the same time and in conjunction with the settlement involved in the Aiken case, at a joint hearing upon similar petition and notice to holders of notes and similar orders and decrees were entered, all of which expressly reserved the cause of action against the defendant directors (R. 242). The settlement in each case was contingent upon approval of the settlement in the other (R. 132).

In response to defendants' motions for summary judgment here, plaintiffs filed a verified answer substantially the same as in the Aiken case setting forth the facts in re-

spect to the intention of the settling parties and requested an opportunity to prove the same (R. 239-245); defendants filed a reply (R. 274), and by statements of counsel in open court (R. 271-274, 285-288) admitted all of said facts in order to dispense with further proof. On December 7, 1939, after preliminary hearings before Judge Wilkerson, he transferred the cause to the Executive Committee for reassignment and it was reassigned to Judge Charles G. Briggle (R. 276).

In order to avoid duplication we limit the Statement of the Matters involved as above set forth, respectfully referring the Court to the more detailed statement appearing in the petition for certiorari filed in the case of Aiken, *et al. vs.* Insull, *et al.*

Jurisdiction of This Court to Review the Decree in Question.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (28 U. S. C. A. Sec. 347). The decree which the petitioner seeks to have reviewed was entered by the Court of Appeals of the Seventh Circuit on August 22, 1941 (R. 359). Petitions for rehearing were denied October 1, 1941 (R. 405).

The Questions Presented and the Reasons for the Allowance of the Writ.

The questions presented and the reasons for the allowance of the writ in this case are the same as those stated in the petition for certiorari filed simultaneously herewith in the case of Thomas D. Aiken, *et al.*, against Samuel Insull, *et al.*, which are hereby adopted (except Question No. 7 and Reason No. 6, the facts on which they are based not existing in the case at bar).

In view of the fact that the matters involved and questions presented in this case are substantially the same as those in the case of *Aiken* v. *Insull,* as explained above, and in order to avoid duplication, petitioners respectfully adopt as their supporting brief the brief filed in support of the Petition for Writ of Certiorari in the *Aiken* case by the plaintiffs therein.

WHEREFORE, your petitioner prays that the Writ of Certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals, for the Seventh Circuit, commanding that Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this cause to the end that this cause, insofar as it involves the summary judgment barring the plaintiffs from maintaining the cause of action against directors for having induced the wrongful pledging of assets, may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals affirming said summary judgment be reversed; and that the decree of the District Court insofar as it allows said summary judgment be set aside; and that your petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

DE MET'S INC., AND
ROBERT E. WOOD,
By EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
ROGER Q. WHITE,
GEORGE F. CALLAGHAN,
ALBERT W. FROEHDE,
Counsel for Plaintiff-Petitioner and Intervenor-Petitioner.

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DEC 31 1941
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 827

STANLEY FIELD,

Petitioner,

vs.

DE MET'S INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

DONALD F. MCPHERSON,
JAMES F. OATES, JR.,
GEORGE RAGLAND, JR.,
11 South La Salle St., Chicago,
Attorneys for Petitioner, Stanley Field.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

STANLEY FIELD,

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vs.

DE MET'S INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Stanley Field, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment entered by that court on October 1, 1941, in so far as it reverses the judgment entered in the above cause by the District Court for the Northern District of Illinois, Eastern Division. A petition for certiorari, together with the printed record in the cause, has been filed by the plaintiff below and cross-petitions for certiorari have been filed by certain defendants.

This cause was argued orally before the Circuit Court of Appeals at the same time as *Aiken, et al.* v. *Insull, et al.* The cases involved different companies, different directors, and

different transactions. The petitioner, Stanley Field, had no connection with the corporation involved in the *Aiken* suit and was not involved in the transactions therein concerned. This petition for certiorari is filed on behalf of Stanley Field who is a defendant below in the instant case only.

As hereinafter stated in the brief in support of this petition, Field stands before the Court on a basis entirely distinct and different from any other party.

OPINIONS BELOW.

The Memoranda of Holdings by the District Court appear at pages 292-300 of the record, and have not been reported.[1] The opinion of the Seventh Circuit Court of Appeals, dated August 22, 1941, with petitions for rehearing denied October 1, 1941, which reverses the District Court in part, is reported at 122 F. (2d) 755. (R. 344-346) The opinion of the Seventh Circuit Court of Appeals in *Aiken, et al.* v. *Insull, et al.* is reported at 122 F. (2d) 746. (R. 347-358)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)). The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered October 1, 1941. (R. 405)

STATUTE INVOLVED.

In so far as this petition for certiorari is concerned, the case involves the former Section 23 of the 1919 Illinois Corporation Act. That section is set forth in full as Appendix B attached hereto.

[1] Those portions of the memoranda of the District Court dealing with the issue here involved are included as Appendix A hereto.

STATEMENT OF FACTS.

This action was brought on January 30, 1933, to recover damages from the directors of Corporation Securities Co. of Chicago (including the petitioner), following the bankruptcy of that Corporation which occurred in April, 1932. (R. 2) The complaint was filed in equity and purported to be a class suit brought by a Delaware corporation as holder of certain serial gold notes of Corporation Securities Co. of Chicago on behalf of itself and "all other owners and holders of such other notes similarly situated, and all other creditors, who desire to join in this proceeding and share the costs and expenses thereof * * *." (R. 2) More than four years later a so-called "committee" intervened on behalf of certain noteholders. (R. 47)

The Circuit Court of Appeals reversed the District Court's order dismissing the complaint in so far as a violation of Section 23 of the 1919 Illinois Corporation Act was averred. The only allegations upon which the statutory violation by the directors is charged are set forth in the following five sentences of the complaint:

> "22. At no time between January 1, 1930 and April 16, 1932, did the company have any actual surplus whatsoever. The books of the company, when the irregularities set forth above[1] are corrected, show that the company did not have, and the company did not in fact have, cash income for any year in excess of its cash expenses and interest charges for that year."
>
> "33. As hereinabove set forth, the company had no surplus at any time during the years 1930, 1931 and 1932. Nevertheless, the company paid cash dividends during each of these three years on all classes of its

[1] These so-called "irregularities" are described in paragraphs 16-19 of the complaint, and consist of certain bookkeeping practices which the plaintiff charges were erroneous and not in conformity with the "accounting practices" which the plaintiff urges should have been followed. (R. 8-9)

Preferred Stock, the exact amounts of which cash dividends are unknown to the plaintiff."

"34. The Board of Directors authorized or ratified the payment of dividends as set forth above, thereby rendering themselves jointly and severally liable, within the purview of the Statute of the State of Illinois, set forth above, to the plaintiff, and all other creditors and holders of contracts of the company." (R. 10, 12)

In paragraph 32 of the complaint, Section 23 of the 1919 Illinois Corporation Act was quoted, providing in part as follows:

"The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases: * * * (2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend; * * *."[1]

Promptly after the institution of the suit in 1933 this petitioner filed a motion to dismiss the complaint, urging, among other things, that the complaint was totally insufficient to state a cause of action under the former Illinois statute in that it contained no allegation of knowledge by the defendant directors, no allegation that the Corporation was insolvent or was rendered insolvent or that its capital was impaired by the dividends, and in that the allegation in respect of assent was ratification after the fact rather than approval in advance of the fact.

Petitioner's motion to dismiss, and motions to dismiss

[1] The complaint also alleged liability on the part of the defendant directors for assenting to a supposed violation by Corporation Securities Co. of covenants contained in its Serial Gold Notes against pledging its assets without ratably securing the holders of those notes, by the pledging of securities to certain Chicago and New York banks. As to this charge, the District Court sustained motions for summary judgment in favor of the defendants based on *res adjudicata*, and the Seventh Circuit Court of Appeals affirmed. The plaintiff below has filed a petition for certiorari from that action of the Circuit Court of Appeals, and the petitioner here, Stanley Field, will file a brief in opposition thereto.

filed by other defendants, were continued generally on January 19, 1934 (R. 39), and were not brought up for argument until late in 1939. At that time the District Court sustained the defendant directors' motions to dismiss the complaint in respect of the charge of violation of Section 23 of the 1919 Illinois Corporation Act, on the ground that the complaint stated no actionable facts. (R. 298-299) At this juncture, the plaintiff moved to amend the complaint in certain particulars. This motion was denied by the District Court, primarily because of the long delay. The District Court entered its final decree on March 7, 1940, disposing of the entire cause, including the charge based on violation of the Illinois statute, in favor of the defendant directors. The Seventh Circuit Court of Appeals, while affirming the judgment of the District Court in other respects, reversed it in respect of the alleged violation of the former Illinois statute and remanded the case for trial in the District Court. The Circuit Court of Appeals further held that the District Court should have allowed the amendment to the complaint.

QUESTIONS PRESENTED.

The essential question is: Did the complaint state a cause of action against Field under the former Illinois statute (Section 23 of the 1919 Illinois Corporation Act), in respect to the payment of dividends in the early thirties prior to bankruptcy? This essential question may be restated into the following two subordinate questions:

(a) Was the complaint fatally defective in failing to allege that the petitioner had knowledge of insolvency or impairment of capital at the time of dividends?

(b) Was the complaint fatally defective in alleging ratification after payment of dividends instead of assent in advance of dividends?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Seventh Circuit Court of Appeals has decided an important question of local law arising exclusively under a former Illinois statute in conflict with the applicable decisions of the Supreme Court of Illinois in the following respects:

(a) In holding that this petitioner, Field, may be liable, if the evidence warrants it, even though neither the complaint nor the amendment thereto alleged that he knew at the time the dividends were declared and paid, or at any time, that the company was, or was thereby rendered, insolvent, or that its capital was impaired; and

(b) In construing the word "assent" in the former Illinois statute to include ratification of a dividend after the fact.

WHEREFORE your petitioner respectfully prays that, the printed record of the case already having been filed with this Court on the petition for certiorari of the plaintiff, this Court shall reverse the order of the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, in so far as it reverses the order of the District Court for the Northern District of Illinois, Eastern Division; that the judgment of said District Court shall be ordered affirmed; and that the petitioner shall be granted such other and further relief as to this Honorable Court may seem just and proper.

DONALD F. MCPHERSON,
JAMES F. OATES, JR.,
GEORGE RAGLAND, JR.,
Attorneys for Petitioner,
Stanley Field.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION OF STANLEY FIELD FOR A WRIT OF CERTIORARI.

This petitioner, Field, stands before the Court on an entirely different basis from any other party. He is a defendant in the instant case only. His connection with the company here involved, Corporation Securities Co. of Chicago, was slight. He did not participate in the company's organization and had no association with or knowledge of its affairs prior to his election to the board of directors in June, 1930. He was never an officer or member of its executive committee, and he had no personal transactions with the company of any character at any time.

Even this connection, slight as it was, was limited to the company here involved, Corporation Securities Co. of Chicago, and did not extend to Insull Utilities Investments, Inc., the company involved in *Aiken, et al.* v. *Insull, et al.* The petitioner never had any connection as officer, director, stockholder, security holder, creditor, or otherwise, with that company. Wholly different financial transactions and securities are involved there from those involved here. Respondent's counsel have adroitly prosecuted the two cases together and have taken full advantage of the similarity between the two complaints. As above stated the two cases were argued together before the Circuit Court of Appeals. This petitioner, as a defendant in the instant case only, has been severely prejudiced throughout by such similarity. It has obscured the essential weakness of the complaint in this case.

Indeed the Circuit Court of Appeals stated that the complaint in the instant case "is not as complete" as the Aiken complaint, but, without mentioning any of the allegations of the instant complaint, concluded that "in substance the complaints in the two cases make the same

allegations," and said that, "We are satisfied that the same result should be reached in this case as in Case No. 7430 [the *Aiken* case], especially as to the cause of action relating to the improper pledging of corporate assets."[1] (122 F. (2d) 755, 756) The Circuit Court of Appeals further stated: "That portion of the opinion rendered in Case No. 7430 which is applicable here, is incorporated by reference." (p. 757)

A.

Knowledge Is a Condition Precedent to Liability Under the Former Illinois Statute and Must Be Alleged as Well as Proven.

The cause of action relating to dividends arises solely under the former Illinois statute, Section 23 of the 1919 Illinois Corporation Act. That statute, as the Circuit Court of Appeals recognized, created liability only if the directors affirmatively and knowingly participated in the wrongful payment of dividends. The statute did not even purport to create liability for negligence or lack of financial wisdom. The Circuit Court of Appeals erred, however, in distinguishing between the pleadings and the evidence in respect to the indispensable requirement of knowledge.[2] The statute warrants no such distinction.

---

[1] The Circuit Court affirmed the judgment of the District Court in favor of the defendants as to the improper pledging of assets, and the plaintiff has filed a petition for certiorari to review that ruling.

[2] The Circuit Court of Appeals in its opinion in the instant case stated: "We think that the pleadings in this case, as in No. 7430, sufficiently charge the defendants with participation. Perhaps the evidence will not show this. Perhaps the evidence will show, as to one or more of the defendants, a want of control or command, an attitude of gross negligence, an irregular attendance plus perfunctory exercise of the voting power, see *Lewis* v. *Montgomery*, 145 Ill. 30, 48, 33 N. E. 880, and *Slater* v. *Taylor*, 241 Ill. 102, 89 N. E. 271. Perhaps the evidence will not show this, but that is not important now." (122 F. (2d) 755, 757)

The cause of action in the instant case for alleged violation of the former Illinois dividend statute consists of the five sentences in the complaint quoted on pages 3-4 of the Petition. Section 23 provided that the directors should only be liable for declaring or assenting to a dividend if the corporation was, or was thereby rendered, insolvent, or its capital was impaired. The complaint makes no attempt to comply with this requirement of the statute but alleges in lieu thereof that the company had "no actual surplus" and that, if its books were changed to meet the plaintiff's partisan views as to proper "accounting practices", the company "did not in fact have cash income." Such allegations recognize that the company's books, upon which the petitioner, Stanley Field, was clearly entitled in good faith to rely, showed that it did, in fact, have a surplus.

Field's good faith is not even remotely questioned and the complaint does not allege that he had actual knowledge even of the asserted bookkeeping "irregularities", much less that the company was insolvent or its capital impaired. Since the complaint was fatally defective, the Illinois Constitution protects the defendants against the plaintiff's attempt seven years later to partially remedy the defects by filing an amendment. *Board of Education* v. *Blodgett*, 155 Ill. 441. Nor does even the amendment allege that this petitioner knew, when the dividends were declared and paid, or at any time, that the company was, or was thereby rendered, insolvent, or that its capital was thereby impaired. (R. 301-306) The amendment did not attempt to cure this fatal defect as to the petitioner because it could not be cured. In 1938 the Illinois Appellate Court after a careful scrutiny recognized the essential integrity of the conduct of the petitioner, Stanley Field. In *Howard* v. *Insull*, 294 Ill. App. 20 (being a companion proceeding instituted in the Illinois state court

against directors on behalf of creditors by the Bankruptcy Trustee of Corporation Securities Co. of Chicago) the Illinois reviewing court affirmed the Superior Court's dismissal of the complaint before trial as to Field.

The Supreme Court of Illinois in *Lewis* v. *Montgomery*, 145 Ill. 30, 46, cited by the Circuit Court of Appeals, has held that even if directors of a corporation were "grossly recreant to their legal duties as directors," they incur no liability under the former Illinois statute unless they affirmatively and knowingly participated in the wrongful payment of dividends. This rule, we submit, requires not only proof of knowledge but also direct allegations of such knowledge.

An earlier decision of the Circuit Court of Appeals for the Seventh Circuit in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 F. 525 (1920) followed as controlling the rule laid down by the Supreme Court of Illinois in *Lewis* v. *Montgomery* as to liability under the former Illinois statute and affirmed the dismissal of a complaint which did not contain direct allegations of knowledge. In that case (as stated by the Circuit Court of Appeals) a complaint was filed by certain creditors under the Illinois statute to hold directors "liable for assenting to the payment of dividends by *Lyon-Ratcliff Company*, which it is alleged diminished its assets below the amount of the capital stock, and for assenting to the payment of dividends when the corporation was insolvent." (p. 526) It was not alleged in the complaint in the *Lyon-Ratcliff* case, however, that "the directors actually knew" the facts relating to the alleged impropriety. (p. 526) For this reason the District Court dismissed the complaint "for want of equity upon its face," holding "that such knowledge was a condition precedent to recovery." (pp. 526-527) The Seventh Circuit Court of Appeals stated that "the correctness of

that ruling presents the sole question here." (p. 527) After analyzing the holding of the Supreme Court of Illinois in *Lewis* v. *Montgomery*, the Circuit Court of Appeals concluded that: "We are of opinion that the words 'assenting thereto' mean a conscious approval of facts actually known", and affirmed the dismissal. (p. 527)

The settled construction of the former Illinois statute by the Illinois Supreme Court should have been followed by all federal courts. The rule of law was stated thus by this Court in *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, 493 (1934):

> "The applicable state statute furnishes the rule of decision for a federal court sitting in the state or outside its borders. And in that court the law must be given the meaning and effect attributed to it by the highest court of the state, as if the state court's decision were literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness of the state court's views."[1]

Similarly, in *Minnesota* v. *Probate Court*, 309 U. S. 270 (1940), this Court, after discussing the Minnesota statute involved and the construction placed thereon by the Minnesota Supreme Court, stated at page 273:

> "This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."

In the case of *White-Wilson-Drew Co.* v. *Lyon-Ratcliff*

[1] Equally binding upon federal courts is the state court's construction of a former state statute. In *Lisman* v. *Knickerbocker Trust Co.*, 211 Fed. 413 (C. C. A. 6, 1914), the court stated at page 420: "It is true that the statute of 1873 is not before us, but if it is clear that the construction placed upon that statute would logically and necessarily involve a similar construction of the statute of 1901, we should equally feel bound by the construction of the earlier statute adopted by the highest court of that state."

Co., cited above, the Circuit Court of Appeals for the Seventh Circuit recognized as controlling in all respects the construction placed on the Illinois statute by the Supreme Court of Illinois. It applied that construction to the pleadings as well as to the proof. The Court erroneously departed from that view in the instant case and refused to apply the test laid down by the Illinois court to the pleadings.

B.

The Word "Assent" in the Former Illinois Statute Meant Approval in Advance of Dividends and Not Ratification After Dividends.

The original complaint alleged that the defendant directors "authorized or ratified the payment of dividends" alleged to have been paid in violation of the Illinois statute. The amendment to the complaint proposed no substantial change in this respect as to the petitioner. The amendment stated that Field "assented to the declaration of the dividend described" (in the preceding paragraph) "by voting in favor of a resolution ratifying, confirming, or approving said dividend." (R. 302-303, pars. (f), (h), (j), (l), (n) and (p)) Moreover, the amendment affirmatively showed that Field was not present at any of the meetings of the directors of Corporation Securities Co. of Chicago, at which dividends were declared by the board of directors.

The original complaint in the instant case contained no reference to an executive committee. The amendment which plaintiff attempted to file alleged the formation of the executive committee consisting of certain members of the board of directors (not including Field) and showed that all of the dividends complained of were declared by directors who were members of the committee at meetings

not attended by Field. (R. 305, 306) The last paragraph of Section 23 provides that "*Unless a director was absent from the meeting at which such dividend was declared* • • • or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." Necessarily the director who is absent from the meeting at which the dividend was declared is free from liability. While the statutory attempt to establish a conclusive presumption of fact against a director who was present at the meeting at which a dividend was declared renders the entire statute unconstitutional,[1] in our opinion, the quoted clause shows that the Illinois legislature did not intend that a director could be held liable who was not even present at the meeting. Concerning a similar statute in Oklahoma, the Supreme Court of that state said in *Watkinson* v. *Adams*, 103 Pac. (2d) 498, 500 (Okla., 1940):

> "The statute as conclusively excludes from liability the absent directors as it creates liability on the part of those who were present at the particular meeting and did not enter their dissent."

The principal opinion of the Seventh Circuit Court of Appeals, as stated, is in the *Aiken* case, to which Field has never been a party, but which nevertheless is incorporated by reference in the opinion in the instant case. In the *Aiken* opinion the Court states:

> "It is plain to us that the word 'assenting' includes the approval and ratification of a dividend after it has been declared." (122 F. (2d) 746, 753.)

This holding is entirely inconsistent with the construction of the Illinois statute by the Supreme Court of Illinois in *Lewis* v. *Montgomery*, 145 Ill. 30, 47, which is as follows:

> "In *Woolverton* v. *Taylor*, 132 Ill. 197, the statute sought to be invoked here was under consideration, and

[1] See *Carolene Products* v. *McLaughlin*, 365 Ill. 62, 70, 5 N. E. (2d) 447 (1936); *Chicago Motor Club* v. *Kinney*, 329 Ill. 120, 134, 160 N. E. 163 (1928).

> we there held, that while the liability imposed is not penal but contractual, it is like that of a surety and therefore *stricti juris*. This being the case, the statute should receive a construction in consonance with the nature of the obligation imposed. The words employed should be interpreted according to their plain and obvious meaning, and should not be extended by construction so as to embrace cases not clearly within the terms of the statute. The liability is created only where the indebtedness of the corporation exceeds the amount of the capital stock, and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors after it has been so constructed as to become binding upon the corporation, should not have the effect of charging them with this statutory liability."

Subsequent Illinois cases have consistently held in conformity to the rule of the *Lewis* case that "assent" as used in the Illinois statute did not include "ratification." In *Slater* v. *Taylor,* 241 Ill. 102, 108, the Supreme Court of Illinois held:

> "It is true that the defendants would not be liable under the statute if they merely recognized the existence of the indebtedness after it was created * * *."

Similarly in *McCutcheon-Gerson Service* v. *The T. & R. Co.,* 236 Ill. App. 261, it was held that:

> "* * * the liability created by the statute exists only where the indebtedness of the corporation exceeds its capital and it is imposed only upon the directors and officers assenting to such excess of indebtedness and that this meant the assenting to the creation of the indebtedness and not merely recognizing it after it had been created."

In *Edwards* v. *Cleveland Dryer Co.,* 83 Ill. App. 643, 652, the Appellate Court for the First District, after discussing *Lewis* v. *Montgomery,* stated:

> "The court in the case cited not only held that section 16 should be strictly construed, but practically so con-

> strued it, by holding that persons who were directors when indebtedness in excess of the amount of the capital stock of the company was created, but who did not, in fact, participate in the creation of such excessive indebtedness, could not be made liable."

Similarly, the Appellate Court for the Fourth District in *Illinois State Bank* v. *Queen City Quarry Co.*, 203 Ill. App. 176, 177, held:

> "Mere recognition by a director or officer of a corporation of an indebtedness of the corporation in excess of its capital stock, or the fact he might have interposed to prevent such excess, is not sufficient to make him liable under Hurd's Rev. St. ch. 32, Sec. 16, providing that directors or officers of a corporation who assent to indebtedness in excess of its capital stock shall be personally and individually liable for such excess."

For the reasons stated above, this settled construction of the former Illinois statute should have been followed by the Circuit Court of Appeals.

CONCLUSION.

This petitioner respectfully urges that the Petition for a Writ of Certiorari filed by him herewith should be granted and that this Court on hearing should set aside the judgment of the Circuit Court of Appeals for the Seventh Circuit in so far as it reverses the order of the District Court, and affirm the decree of the District Court in all respects.

Respectfully submitted,

DONALD F. MCPHERSON,
JAMES F. OATES, JR.,
GEORGE RAGLAND, JR.,
11 South La Salle St., Chicago,
Attorneys for Petitioner, Stanley Field.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

APPENDIX A.

Portion of Memoranda of Holdings of District Court dealing with the issue involved in this petition for certiorari (R. 298-299):

MOTIONS TO DISMISS.

Allegations re payment of dividends.

In the St. Johns case [*Aiken, et al.* v. *Insull, et al.*] this subject is covered by Paragraphs 41 to 45, inclusive, of the complaint. Paragraph 43 avers that on January 9, 1932, at a meeting of the Board (all present except two) a resolution was unanimously adopted ratifying, confirming and approving the action of the Executive and Finance Committees, directing the payment of a dividend to stockholders of record December 15, 1931, such dividend being payable January 2, 1932. Taking this allegation most strongly against the pleader, I assume that the ratification and approval of the Board was given seven days after the dividend had been paid. This obviously is an insufficient allegation to charge the directors because the wrong had been consummated before the action of the directors. (*Lewis* v. *Montgomery*, 145 Ill. 30; *Slater* v. *Taylor*, 241 Ill. 102.)

Paragraphs 44 and 45 allege that the company had no surplus at any time during the years 1929, 1930, 1931 and 1932, but paid cash dividends during each of these three years (which three I do not know); that the Board of Directors authorized or ratified the action of the Finance or Executive Committee, authorizing such payment of dividends. There are 15 defendants named in this suit and elsewhere in the complaint appears an allegation that each of the defendants was a member of the Board of Directors from January 14, 1929, to April 16, 1932. How many and which ones were present at the meeting where the action of the committee was ratified we are not told by the complaint.

The liability under the statute must be predicated upon the individual director having declared or assented to a dividend and it is not enough to say that the company or the board or the committee declared a dividend. It would be a dangerous theory of law if an individual director were to be held liable for some misfeasance or malfeasance related to his conduct as a director without the assertion of some fact to show wrong on the part of the specific director involved.

The allegations concerning payment of dividends in contravention of Section 23 of the 1919 Corporation Act are insufficient to charge any individual defendant with such responsibility. (*Lewis* v. *Montgomery, supra.*)

In the De Mets case the allegations on this subject are in part similar to the St. Johns case, but not quite so full as the St. Johns case, hence, likewise, obnoxious to the motion.

In view of the conclusion reached on this allegation of the complaint, it is unnecessary to pass upon the constitutionality of Section 23.

APPENDIX B.

Section 23 of the 1919 Illinois Corporation Act provided in full as follows:

> The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases:
>
> (1) For assenting to an indebtedness in excess of the amount of the capital of the corporation, to the amount of such excess; *provided* no director shall be liable under this clause (1) of this section if at the time such indebtedness is incurred, the value of the assets of the corporation as a going concern is greater than the amount of such indebtedness, including in such assets the assets acquired with or resulting from the incurring of such indebtedness; but not including in such assets good will or any sum therefor.
>
> (2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend;
>
> (3) For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.
>
> For the purposes of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding.
>
> Unless a director was absent from the meeting at which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto.

No. 823

FILED
DEC 30 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

SAMUEL INSULL, JR., et al.,
Cross-Petitioners,

vs.

THOMAS D. AIKEN, et al.,
Cross-Respondents.

Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

CROSS-PETITION.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

No. .....

SAMUEL INSULL, JR., et al., Cross-Petitioners, vs. **THOMAS D. AIKEN, et al.,** Cross-Respondents.	Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Cross-Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

Samuel Insull, Jr., H. L. Stuart, Edward J. Doyle, George F. Mitchell, Philip J. McEnroe and Stuyvesant Peabody respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit directing that Court to certify to this Honorable Court the record in the case of *Thomas D. Aiken et al., Plaintiffs-Appellants,* v. *Samuel Insull, Jr., et al., Defendants-Appellees,* No. 7430 in that Court, in order that the decision and judgment of said Court rendered October 1, 1941, may be reviewed in so far as the Circuit Court of Appeals reversed the decree of the District Court for the Northern District of Illinois.

On this day, Thomas D. Aiken and others filed their petition for a writ of certiorari to said Circuit Court of

Appeals in this case accompanied by a transcript of the record from said Court seeking to have this Court review that portion of the decision and judgment of said Court which affirmed the decree of the District Court. These cross-petitioners will oppose the petition of Thomas D. Aiken and others on the ground that the Circuit Court of Appeals was right in so far as it affirmed the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A., Sec. 347.) This cause originated in the United States District Court for the Northern District of Illinois and was reviewed on appeal by the United States Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals was filed August 22, 1941, but petitions for rehearing were filed and denied, and final judgment was rendered October 1, 1941. R. 351, 461.

Statement of the Case.

The complaint was filed February 3, 1933, in the names of twenty-nine holders of Series B Debentures issued by Insull Utility Investments, Inc. (hereinafter called "I. U. I.") on behalf of themselves and all other holders of such debentures similarly situated, and all other creditors who desired to join and share the costs and expenses of the suit. (R. 2.) When the complaint was filed it purported to allege five causes of action,—(1) an action for wrongful declaration of dividends in violation of statute, (Pars. 41-45) (2) an action for wrongful pledging of assets in violation of debenture covenants, (Pars. 23-40) (3) an action for improper use of corporate funds in settlement of claims, (Par. 46) (4) an action for purchasing securities in

deviation from the advertised purpose of the corporation, (Par. 47) and (5) an action for wrongful investment of funds in stock of Corporation Securities Co. of Chicago. (Pars. 21-22.) Plaintiffs (cross-respondents here) have abandoned all but the first two alleged causes of action.

In so far as the complaint relates to the alleged cause of action for declaration of dividends in violation of the Illinois statute, it alleges* that there was in force during the period involved Section 23 of the 1919 General Corporation Act of Illinois which provides that directors shall be jointly and severally liable for "declaring or assenting to a dividend" if the corporation is or is thereby rendered insolvent or its capital is thereby impaired (Par. 41); that on December 13, 1931, the liabilities of I. U. I. exceeded the "market value" of its assets, and that on that date and ever since the corporation was and has been insolvent (Par. 42); that on January 9, 1932, a resolution was adopted by the board of directors "ratifying" a reso-

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*41. During all of the period of the existence of Insull Utility Investments, Inc., there has been in full force and effect a certain statute of the State of Illinois known as Section 23 of the General Corporation Act, which is in words and figures as follows:

"The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases:

(1) For assenting to an indebtedness in excess of the amount of the capital of the corporation, to the amount of such excess; provided no director shall be liable under this clause (1) of this section if at the time such indebtedness is incurred, the value of the assets of the corporation as a going concern is greater than the amount of such indebtedness, including in such assets the assets acquired with or resulting from the incurring of such indebtedness; but not including in such assets good will or any sum therefor;

(2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend;

(Footnote continued on pages 4 and 5)

lution of the Executive *and* the Finance Committees "authorizing and directing" the payment of a dividend on January 2, 1932 to stockholders of record on December 15, 1931, (Par. 43); that the corporation had no surplus at any time during the years 1929, 1930, 1931 and 1932, but the "corporation" paid cash dividends during each of these three years on its preferred stock, the exact amounts of which are unknown to plaintiffs (Par. 44); and that the "board of directors authorized or ratified" the action of the Finance *or* Executive Committee authorizing the payment of said dividends, thereby rendering "themselves" jointly and severally liable within the purview of the statute to the plaintiffs and all other creditors and holders of contracts of the company. Par. 45.

This case was presented to the District Court and is now before this Court as to the cause of action relating to alleged wrongful payment of dividends on the amended motion to dismiss filed by leave of court on October 18,

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(3) For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.

For the purpose of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding.

Unless a director was absent from the meeting of which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto."

42. On December 13, 1931, the total liabilities of Insull Investments, Inc., exceeded the total fair market value of its assets, and that on that date and ever since that date the company was and has been wholly and irretrievably insolvent.

43. On January 9, 1932, at a meeting of the Board of directors held in Room 1700, 72 West Adams Street, Chicago, Illinois, at which meeting all of the directors were present except Martin J. Insull and John H. Gulick, a

1939, (R. 209,) the motion to require plantiffs' attorneys to show by what authority they commenced and are prosecuting this suit filed October 23, 1939, (R. 471,) and the second motion for summary judgment filed November 14, 1939. R. 284.

The amended motion to dismiss sets forth that the complaint does not state a cause of action for illegal payment of dividends for several reasons: (1) A suit under Section 23 of the old General Corporation Act of Illinois must be brought on behalf of *all* creditors, whereas this suit is brought on behalf only of B debenture-holders and such other creditors as elect to join and share the costs and expenses. (2) Said Section 23 is unconstitutional because it is beyond the power of the legislature to declare a *conclusive* presumption of fact, as this section purports to do in its last paragraph, which provides, "Unless a director was absent from the meeting at which such dividend was declared * * * or unless his dissent therefrom

---

resolution was unanimously adopted, ratifying, confirming and approving certain actions of the Executive and Finance Committee, among them a resolution authorizing and directing the payment of the dividend of $1.39 per share on the Company's $5.50 Prior Preferred Stock, payable January 2, 1932, to stockholders of record December 15, 1931.

44. As hereinabove set forth, the Company had no surplus at any time during the years 1929, 1930, 1931 and 1932. Nevertheless, the company paid cash dividends during each of these three years on all classes of its Preferred Stock, the exact amounts of which cash dividends are unknown to the Plaintiffs.

45. The Board of Directors authorized or ratified the action of the Finance or Executive Committee authorizing the payment of dividends as set forth above, thereby rendering themselves jointly and severally liable, within the purview of the Statute of the State of Illinois, set forth above, to the plaintiffs, and all other creditors and holders of contracts of the Company.

shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." (3) The Illinois statute is penal in character and will not be enforced in Federal equity courts. (4) The complaint does not contain the essential allegation that the defendants or any of them as directors of the corporation *declared* or *assented to* the payment of any dividend. (5) The complaint does not allege facts which show that the corporation was insolvent at the time any dividend was declared or that the payment of any dividend rendered the corporation insolvent or that such payment impaired its capital. R. 209-216.

The District Court dismissed the complaint as to this cause of action, basing its decision only on the ground of insufficiency of allegations to state a cause of action. (Opinion, R. 296; Decree, R. 321.) The Circuit Court of Appeals reversed the judgment of the District Court as to this cause of action and held that the complaint was sufficient. R. 357-360.

The amended motion to dismiss also challenges the sufficiency of the complaint on the ground that it fails to allege *facts* which show that the requisite jurisdictional amount is present. The only allegations as to amount involved appear in Paragraphs 4, 16 and 43. Paragraph 4 consists merely of the general statement that more than $3,000 is involved. (R. 3.) Paragraph 16 alleges merely the number of $1,000 debentures held by the several plaintiffs. (R. 19.) Paragraph 43 alleges that the Executive and the Finance Committees authorized and directed the payment of a dividend of $1.39 a share on the preferred stock outstanding December 15, 1931, (R. 34,) but there is no allegation how many shares of preferred stock were outstanding on that date and so there is no basis for computing the *amount* of the dividend authorized.

The Circuit Court of Appeals held, contrary to the record, that the complaint "discloses facts from which the amount of a paid dividend may be determined," and by reference to other pleadings and to a proposed amendment offered more than eight years after the occurrences out of which the cause of action arose, held that there was sufficient showing of jurisdictional amount. R. 362.

The amended motion to dismiss also charged that there was a collusive selection of non-resident plaintiffs to give an appearance of jurisdiction in the Federal Courts. (R. 209.) This ground was supported by the affidavit of defendants. (R. 217.) Plaintiffs answered that about two-thirds of the debenture holders who signed separate copies of a uniform contract employing attorneys to collect moneys due on their debentures were citizens and residents of States other than Illinois, and that about one-third of them were residents of Illinois; that the attorneys for this group decided to institute a suit against former directors of I. U. I. in the District Court of the United States for the Northern District of Illinois, and that the secretary of a committee incorporated to conduct litigation respecting recovery on the debentures, after consultation with the attorneys for the group, selected the names of those used as plaintiffs in the filing of this suit. (R. 247-249.) *No named plaintiff was consulted about the use of his name nor did any named plaintiff have any knowledge that he was being named as a plaintiff until after the suit was commenced.* The selection was entirely by residents of Illinois and by persons who had no legitimate interest in the cause of action. R. 480.

The District Court did not rule on the point except by its general order sustaining the motions to dismiss. (R. 321.) The Circuit Court of Appeals held that the facts appearing in the record do not constitute such collusion

as will cause the Federal courts to refuse to entertain the suit. R. 362.

The motion to require plaintiffs' attorneys to show by what authority they commenced and are prosecuting this suit against the former directors of I. U. I. was filed October 23, 1939, and was supported by affidavits showing that the defendants and their attorneys had only recently learned of the lack of authority of plaintiffs' attorneys and by affidavits showing that the named plaintiffs were selected without consulting them and that the suit was commenced without their knowledge. (R. 471.) Plaintiffs' attorneys answered that they had commenced this suit by virtue of the authority conferred upon them by written instruments signed by the several plaintiffs and particularly Paragraph 2 thereof. (R. 474.) This "uniform contract" is addressed to two law firms and the pertinent part reads:

"The Undersigned Hereby Employs You

1. To collect all moneys due upon the Insull Utility Investments, Inc., Debentures listed below the name of the undersigned.

2. To institute, prosecute, join and participate in any and all suits, actions and proceedings in the name of, or on behalf of, the undersigned and that you may deem advisable in furtherance of such collection, in any part of the world where such actions may be brought or may at any time be pending." R. 467.

The answer of plaintiffs' attorneys shows that the first twenty-four named plaintiffs were never formally notified of the commencement of this suit in their names and that there was mailed to the last named five by the incorporated committee a letter dated February 4, 1933, relating to an unidentified suit against former directors in which it is

stated: "It was necessary to file this suit yesterday and we take this means of notifying you that you have been selected as one of the twenty-nine plaintiffs pursuant to the authority granted the attorneys in paragraph 2 of the uniform contract with debenture holders." (R. 475.) *The attorneys admitted that they received no instructions from the named plaintiffs other than as set forth in said uniform contract.* (R. 475.) The chairman of the committee organized and incorporated to conduct this litigation testified that he had no knowledge of the manner of the selection of the plaintiffs and had no instructions from any of them. (R. 483.) The secretary testified that not one of the plaintiffs in whose names this suit was brought ever conferred with the attorneys of the committee or with any member of the committee and that he handpicked the twenty-nine named plaintiffs from the 953 non-resident debenture-holders who had signed contracts with the attorneys pursuant to mail solicitation. (R. 480.) This secretary was a resident of Illinois and was not a debenture-holder when suit was commenced. (R. 477.) The charter says the committee is incorporated to maintain an organization "for the purpose of taking all necessary or proper steps to obtain for such debenture holders the maximum recovery on their debentures." (R. 479.) The complaint is not signed by plaintiffs but is signed by one who says he is their agent. R. 38-39.

The District Court overruled this challenge to the authority of plaintiffs' attorneys (R. 321) and the Circuit Court of Appeals affirmed this ruling. R. 362.

November 14, 1939, a motion for summary judgment was filed asking for an order barring prosecution of this suit against present defendants because of the settlement with and release of four other defendants. (R. 284-285.) The plaintiffs answered that this settlement was effected by covenants not to sue and that no one was released thereby.

(R. 242-246.) The instruments of settlement were signed by Attorney Jacobson pursuant to authority given him under the uniform contract to *compromise and settle* the claims of the debenture-holders. (R. 271.) The suit was dismissed as to the four defendants upon the payment of $50,000. (R. 64-65.) The complaint charged these released defendants with exactly the same acts as are charged against present defendants.

The Contested Issues.

As to the matters presented by this cross-petition the following questions arise and are in issue:

(a) Whether the attorneys appearing for plaintiffs had authority to commence and prosecute this suit.

(b) Whether named plaintiffs were collusively selected to confer on the District Court jurisdiction which it could not otherwise have.

(c) Whether the facts alleged show that the necessary jurisdictional amount is involved.

(d) Whether the complaint alleges facts which state a cause of action against these cross-petitioners for declaring and assenting to the payment of dividends in violation of Section 23 of the 1919 General Corporation Act of Illinois.

(e) Whether said Section 23 is constitutional.

(f) Whether this alleged cause of action for illegal payment of dividends can be maintained on behalf only of such creditors as join in the proceeding and share the costs and expenses thereof;

(g) Whether plaintiffs can maintain this suit in the absence of an allegation that they owned the debentures when the alleged wrongs were committed.

(h) Whether the District Court properly denied the filing of the proffered amendments to the complaint.

(i) Whether the cause of action was released by the settlement with four alleged joint wrongdoers.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in conflict with applicable decisions of the Supreme Court of Illinois.

(a) Under the established law, this suit must be dismissed because the complaint was filed without the knowledge or authority of the plaintiffs and so the suit was never legally commenced. *Frye* v. *County of Calhoun*, 14 Ill. 131; *Town of Kankakee* v. *Kankakee & Indiana R. Co.*, 115 Ill. 88, 92; *Bell* v. *Farwell*, 189 Ill. 414, 417.

(b) When the Circuit Court of Appeals held that "the word 'assenting' includes the approval and ratification of a dividend after it has been declared," it held squarely against the Supreme Court of Illinois which has decided that "assenting" as used in the Corporation Act means assenting to the creation of indebtedness, which corresponds to the declaration of a dividend, and that a recognition of an indebtedness after it has been contracted, and so of a dividend after it has been declared, does not have the effect of charging a director with the statutory liability. *Lewis* v. *Montgomery*, 145 Ill. 30, 47.

(c) The Circuit Court of Appeals also decided contrary to the Illinois law when it held that the Executive Committee of I. U. I. was the agent of the board of directors in the declaration of dividends. *Lewis* v. *Montgomery*, 145 Ill. 30, 46.

(d) The holding of the Circuit Court of Appeals that the settlement with four of the defendants did not release all of the defendants charged jointly with the same wrong is contrary to the established law of Illinois. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *City of Chicago* v. *Babcock*, 143 Ill. 358, 366; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Vigeant* v. *Scully*, 35 Ill. App. 44, 47.

2. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal law in conflict with applicable decisions of this Court and with its own decisions and with decisions of other Circuit Courts of Appeals.

(a) The record shows that none of the debenture-holders who were non-residents of Illinois had any knowledge of the selection of the named plaintiffs or of the commencement of this suit until after the suit had been commenced and that the non-residents whose names were used as plaintiffs were handpicked by a resident of Illinois, who was not a debenture-holder, under the direction of the attorneys who appear for plaintiffs, with the sole purpose of conferring jurisdiction on a Federal court in violation of the rule stated in *Southern Realty Investment Co.* v. *Walker*, 211 U. S. 603; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181; *Quincy* v. *Steel*, 120 U. S. 241, 248; *Cashman* v. *A. & S. Canal Co.*, 118 U. S. 58, 61; *Detroit* v. *Dean*, 106 U. S. 537, 541; and *Cerri* v. *Akron-People's Telephone Co.*, 219 Fed. 285.

(b) Under the facts shown by this record, plaintiffs' attorneys commenced this suit against the former directors of I. U. I. without the knowledge or the authority of the named plaintiffs and under the

rule stated in *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, 319, and *Sutherland* v. *International Ins. Co.*, 43 Fed. (2nd) 969, 972, this suit must be dismissed.

(c) The construction placed on Section 23 of the 1919 General Corporation Act of Illinois by the Circuit Court of Appeals in this case extends the statute by construction to embrace cases not within its terms contrary to the decision of the same Circuit Court of Appeals in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525, 527.

(d) Since the original complaint did not state a cause of action with respect to improper payment of dividends, the new cause of action alleged in the proposed amendments, if a cause of action is alleged, is barred by the Statute of Limitations. *N. & G. Taylor Co.* v. *Anderson*, 275 U. S. 431, 439; *Allis-Chalmers Manufacturing Co.* v. *City of Chicago*, 297 Ill. 444; *Board of Education* v. *Blodgett*, 155 Ill. 441.

(e) The District Court ruled in accordance with the established practice in denying amendments offered seven years after the suit was commenced and about nine years after the occurrences out of which the alleged cause of action arose. *National Bank* v. *Carpenter*, 101 U. S. 567, 568; *United States* v. *First Wisconsin Trust Co.*, 92 Fed. (2nd) 840, 844.

(f) The law is established that the requisite jurisdictional amount must affirmatively and distinctly appear from the allegations of the complaint and that a defect in such allegations cannot be helped by presumptions or argumentative inferences drawn from the complaint. There is no allegation in the complaint at bar of the amount of any dividend paid nor are there facts alleged from which the amount may be determined. The decision in this case is contrary to the rule in *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed.

(2nd) 753, 754; *Smith* v. *McCullough*, 270 U. S. 456, 459; *Norton* v. *Larney*, 266 U. S. 511, 515; and *Hanford* v. *Davies*, 163 U. S. 273, 280.

(g) Since plaintiffs have not by their allegations shown that the alleged wrongs occurred while plaintiffs were the owners of debentures, they cannot maintain this suit. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629.

(h) The Circuit Court of Appeals was in error when it used plaintiffs' other pleadings and proposed amendments to bolster up the original complaint. It is established that on motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South La Salle Street, Chicago,
Solicitors for H. L. Stuart, Samuel Insull, Jr., Edward J. Doyle, George F. Mitchell and Philip J. McEnroe.

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle Street, Chicago,
Solicitors for Stuyvesant Peabody.

ARGUMENT IN SUPPORT OF CROSS-PETITION.

I.

The complaint did not state a cause of action against the defendants for alleged wrongful payment of dividends.

We present this point first because it is the ground on which the District Court dismissed the complaint as to the alleged cause of action against the former directors of Insull Utilities Investments, Inc. for declaring or assenting to the payment of a dividend in violation of Section 23 of the General Corporation Act of Illinois of 1919, which was repealed by the Business Corporation Act of Illinois of 1933. We shall undertake to show that the holding of the District Court is in line with the established law of Illinois as declared by the Supreme Court of Illinois and the Federal courts of the Seventh Circuit.

The only specific allegations with respect to the declaration of or the assenting to dividends are that "the board of directors authorized or ratified" the action of the Finance *or* the Executive Committee declaring dividends. (Par. 45.) This is far from alleging that any present defendant, *acting as a director,* "declared or assented to a dividend" within the meaning of the old Illinois statute. The only specific reference to a meeting of the board of directors is to the one held on January 9, 1932, where it is said a resolution was adopted "approving and ratifying" a resolution of the Executive *and* Finance Committees "authorizing and directing" the payment of a dividend on January 2, 1932, to stockholders of record December 15, 1931. (Par. 43.) It does not appear from these

allegations whether the dividend was authorized or directed by the Executive Committee or by the Finance Committee or by both, nor does it appear whether the dividend had already been paid at the time of the alleged action by the board of directors. Presumably, the dividend was paid January 2, 1932, and so the "approving and ratifying" by the board of directors a week later was certainly not a "declaring or assenting to a dividend" which is the only act which fixes the liability under the statute.

We here point out that neither cross-petitioner Peabody nor McEnroe nor Doyle nor Mitchell were members of the Finance Committee and only Doyle of this group was a member of the Executive Committee. Cross-petitioners Insull and Stuart were members of both committees. (R. 5-6.) But there is no allegation that either Insull or Stuart was present at any meeting of the Finance Committee where a dividend was declared or that either Insull or Stuart or Doyle was present at a meeting of the Executive Committee where a dividend was declared. The Finance Committee consisted of five members (Par. 10) and the Executive Committee consisted of seven members, (Par. 9) and *the action may have been taken by either committee by a majority which did not include any of cross-petitioners.* As Judge Briggle found, (R. 297,) no present defendant is definitely charged with any act in declaring or assenting to the dividend.

We deem the failure to allege that any of the present defendants (cross-appellants here) ever declared or assented to the payment of a dividend is conclusive against the sufficiency of the complaint. The offense penalized by the statute is the participation in the wrongful declaration of a dividend at the time it is declared. Ratification is not made actionable. In *Lewis* v. *Montgomery,* 145 Ill. 30, the Illinois Supreme Court squarely ruled that "assenting"

meant approval at the time of the action and not subsequent ratification. There it was sought to hold directors liable for recognizing indebtedness that had been created by the general manager of the corporation in alleged violation of the statute. The Court said (p. 47):

> "The liability is created only where the indebtedness of the corporation exceeds the amount of the capital stock, and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors after it has been so contracted as to become binding upon the corporation, should not have the effect of charging them with this statutory liability."

When the Circuit Court of Appeals holds that "the word 'assenting' includes approval and ratification of a dividend after it has been declared", (R. 359,) it holds squarely contrary to the Supreme Court of Illinois which has decided that "assenting", as used in Section 23 means assenting to the creation of the liability and that a recognition of the obligation of the corporation by the directors after it has been contracted by another agent does not have the effect of charging the directors with the statutory liability. The Circuit Court of Appeals held in an earlier case that this statute should not be extended by construction to embrace cases not within its terms. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525, 527.) It is generally held by the courts, under similar statutes, that mere *ratification* of an improper dividend is not sufficient to create the statutory liability. *Western Mortgage & Guaranty Co.* v. *Grey,* 215 Calif. 191, 8 Pac. (2nd) 1016, 1020; *Watkinson* v. *Adams,* (Okla.) 103 Pac. (2nd) 498, 500.

The Circuit Court of Appeals reasons from the premise that the executive committee of a corporation is the agent

of the board of directors, whereas the Illinois Supreme Court holds squarely opposite in *Lewis* v. *Montgomery,* 145 Ill. 30, saying at p. 46:

> "The directors, though the governing body of the corporation, are only its officers and agents, and any subordinate agent appointed by them, or acting by virtue of their sufferance or recognition, does not thereby become their agent, but the agent of the corporation. His acts are the acts of the corporation, so as to make it liable for debts or obligations incurred by him on its behalf, but they are not the acts of the directors, unless commanded or authorized by them."

There is no allegation that the acts of the executive committee were commanded or authorized by cross-petitioners. The allegations are merely that the board of directors acquiesced in the declaration of a dividend by the executive committee by resolution adopted after the dividend had been declared and paid. R. 34.

Another defect in the complaint that is fatal to the maintenance of this suit by present plaintiffs is that *it is nowhere alleged that they were creditors of the corporation at the time the dividends were declared and paid.* (*Graham* v. *Railroad Co.* 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel,* 212 Ill. 617, 629; *Buell* v. *Lanski,* 232 Ill. App. 500, 511.) Whether they extended credit to the corporation before the dividends were declared or whether they bought their debentures in the open market after the alleged wrong had been done does not appear from the allegations of the complaint. If they bought their debentures *after* the dividends were paid they cannot now sue for alleged wrongs which caused them no legal injury. Courts do not countenance speculation by litigation.

The complaint was filed February 3, 1933 and it is alleged (Par. 16, R. 19) that on that day plaintiffs were the

"owners and holders of debentures." It is not alleged and cannot be inferred that such ownership existed on any day other than that alleged. The only other paragraph which could be contended refers to a date of purchase is paragraph 13 (R. 11-12), but when all of the paragraph is read it is clear that there is no allegation that the named plaintiffs bought their debentures from I. U. I. January 1, 1930 and paid the face amount therefor. It is true that it is alleged in the first part of the paragraph that plaintiffs are part of the public to whom the debentures were issued, but it is alleged by the same sentence that I. U. I. received pay for the debentures from the *underwriters* and that $4,818,000 of said debentures have been paid and cancelled since they were issued. If it can be said that there is an allegation in this paragraph that any plaintiff bought debentures from the underwriters in January 1930, there is no allegation that the debentures mentioned in paragraph 16 are the debentures bought at the time of the original issue, three years before this suit was commenced. The debentures then bought may have been among those subsequently paid and cancelled and those plaintiffs owned at the time this suit was filed may have been debentures acquired after the dividends were declared and paid. All uncertainties and ambiguities in the complaint must be resolved against the plaintiffs.

The liability under Section 23 is personal to the creditors and a suit to enforce the liability must be brought by one or more creditors on behalf of *all* creditors. (*Ryerson & Son* v. *Peden,* 303 Ill. 171, 184; *Seegmiller* v. *Day,* 249 Fed. 177, 179; *Pollard* v. *Bailey,* 20 Wall. 520, 527.) This suit is brought by plaintiffs on their own behalf as holders of B Debentures of I. U. I. and on behalf of all other owners and holders of such debentures similarly situated and all other creditors who desired to join in the suit and share the costs and expenses thereof. (R. 2.) The Circuit Court

of Appeals is in error when it says that "This suit was brought on behalf of all creditors." (R. 361.) Plaintiffs do not sue on behalf of the A debenture-holders except as they are included among other creditors, and then they are not included unless they join in the proceeding and make themselves liable for costs and expenses of this suit. No A debenture-holder ever joined. When this suit was filed the banks and others besides debenture-holders had claims aggregating some $70,000,000. We think it is clear from the allegations of the complaint that it was never intended by plaintiffs to include the banks as their co-plaintiffs. Since this suit was not brought on behalf of all creditors, it cannot be maintained as a suit under the Illinois statute.

Section 23 imposes liability "for declaring or assenting to a dividend if the corporation is, or is thereby rendered insolvent, or its capital is thereby impaired, to the extent of such dividend." No facts are alleged in this complaint which show that the corporation was insolvent at the time any dividend was declared or that the payment of the dividends rendered the corporation insolvent or that such payment impaired its capital. The complaint does not set forth the capital of the corporation, its assets and liabilities are not stated, and the dates of payments or amounts of dividends paid are not alleged. The allegations with respect to the financial condition of the corporation (Pars. 20, 29, 42, 44) are mere conclusions of the pleader and are not allegations of fact which show that the corporation could not legally pay dividends. There are no allegations with respect to any dividend except the last which was paid January 2, 1932. As to this last dividend the allegation in Paragraph 42 that on December 13, 1931, the total liabilities exceeded the total "fair market value" of its assets is not an allegation that the *actual* value of the assets, which were stocks of other corporations, did not exceed the liabilities of this investment company. Further-

more, since this last dividend was declared by the Executive Committee on December 4, 1931, the condition of the corporation on December 13, 1931, would not of itself be sufficient to charge these cross-petitioners as directors with the statutory liability, especially when it is alleged the board did not act until January 9, 1932. There is a complete lack of allegation of essential facts to show either insolvency or impairment when any dividend was declared or assented to by any cross-petitioner in any capacity.

The complaint nowhere alleges facts which show that any of the cross-petitioners knew that the corporation was not in financial condition to pay any of the several dividends. The complaint reveals that the books of the corporation showed a surplus by reason of income from dividends on the stocks held in the portfolio of the company and by reason of the proceeds of the sale of subscription rights. Such of the directors, if any, as the complaint shows assented to the payment of a dividend had the right to rely on these books. *Chick* v. *Fuller,* 114 Fed. 22, 29.

If this action for improper payment of dividends were brought on behalf of all creditors of the corporation and the complaint otherwise alleged a case within the terms of the statute and these plaintiffs (cross-respondents here) were in position to maintain the suit, it could not be maintained because the statute on which it is based is unconstitutional. The last paragraph of the statute provides, "Unless a director was absent from the meeting at which such dividend was declared, * * * or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." It is beyond the power of the legislature to declare a *conclusive* presumption. Such an attempt is an invasion of the judicial field and violates Section 2 of Article II and Article III of the State Constitution and the Fourteenth Amendment to the Federal Constitution. (*Carolene Products Co.* v. *Mc-*

Laughlin, 365 Ill. 62, 70; *People* v. *Rose*, 207 Ill. 352, 361; *Hall* v. *Woods*, 325 Ill. 114, 144; *Heiner* v. *Donnan*, 285 U. S. 312, 329.) This provision of Section 23 creating a conclusive presumption being unconstitutional, it follows that subdivision 2 of this section of which this invalid provision is an essential and integral part, is likewise invalid. (*Chicago Motor Club* v. *Kinney*, 329 Ill. 120, 134; *Springfield Gas Co.* v. *Springfield*, 292 Ill. 236, 243.) The Supreme Court of Illinois decided, under the Illinois Corporation Act prior to the revision thereof in 1919, that a director could only be held liable for the violation of the statute when the evidence showed that he had consciously approved or participated in the wrongful act, (*Lewis* v. *Montgomery*, 145 Ill. 30,) and the Federal courts in Illinois gave this statute the same construction. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525; *Chick* v. *Fuller*, 114 Fed. 22, 29.) The very purpose of the addition of the conclusive presumption clause in 1919 was to change this rule of evidence.

The provision of Section 23 under consideration is a penal statute. It in effect *prohibits* declaration of a dividend which will render the corporation insolvent or which will impair the capital of the corporaton. It *punishes* directors for violation of their duties to the corporation and its stockholders and creditors. (*Vestal Co.* v. *Robertson*, 277 Ill. 425, 430; *Patterson* v. *Thompson*, 86 Fed. 85, 86.) Inasmuch as liability sought to be created by the section is penal in character, a suit cannot be maintained in equity to enforce such liability. (*Loverin* v. *McLaughlin*, 161 Ill. 417, 435; *Robson* v. *Doyle*, 191 Ill. 566, 570.) The Federal courts will not enforce a penal law of Illinois. *Gwin* v. *Breedlove*, 43 U. S. 29, 37; *Sherman* v. *Gassett*, 4 Gil. 521.

For all these reasons the District Court properly dismissed the complaint as to the cause of action for wrongful payment of dividends. While it based its decision only on

the ground of insufficiency of the complaint to state a cause of action, the decree will be sustained if any ground appearing of record is sound. The Circuit Court of Appeals erred in holding the original complaint sufficient and in reversing the decree of the District Court.

We respectfully submit that under the authorities the District Court properly refused the amendment to the complaint not only because it was presented too late, (*National Bank* v. *Carpenter*, 101 U. S. 567, 568; *L. E. Whitham Construction Co.* v. *Remer*, 105 Fed. (2nd) 371,) but also because it failed to state a cause of action. (*Lewis* v. *Montgomery*, 145 Ill. 30, 47.) The allowance of an application to amend rests in the discretion of the trial court and its order denying the application will not be reversed unless there is an abuse. *United States* v. *First Wisconsin Trust Co.*, 92 Fed. (2nd) 840, 844; *Davis* v. *Virginia Ry. & Power Co.*, 229 Fed. 633, 639.

These defendants filed their motions to dismiss in 1933 (R. 39, 43, 46) and plaintiffs had the case continued generally in 1934. (R. 57-58.) In 1939 defendants took steps which stirred plaintiffs to action in this case which they had permitted to lie dormant for more than six years. The proposed amendments were offered March 1, 1940 (R. 299), more than seven years after the complaint was filed. The District Court ruled in accordance with established practice regarding tardy amendments. The Circuit Court of Appeals ruled directly contrary to the spirit of the established law as well as the new Federal Rules of Civil Procedure which stress dispatch of business of the courts and require diligence on the part of litigants. Since the original complaint did not state a cause of action, the new cause of action alleged in the amendments, if a cause of action is alleged, is barred by the Statute of Limitations. (*N. & G. Taylor Co.* v. *Anderson*, 275 U. S. 431, 439; *Allis-Chalmers Co.* v. *City of Chicago*, 297 Ill. 444, 449.) Under Illinois law this com-

pleted bar is a vested right which is protected by the Constitution. *Board of Education* v. *Blodgett,* 155 Ill. 441, *Hanley* v. *Waters,* 255 Ill. App. 239.

II.

The complaint fails to allege facts which show that the requisite jurisdictional amount is involved.

The only paragraphs of the complaint relating to amount involved are paragraphs 4, 16 and 43. Paragraph 4 consists merely of the general statement that more than $3,000.00 is involved (R. 3). Paragraph 16 alleges merely that the plaintiffs are the holders of debentures in varying amounts (R. 19). The allegation in paragraph 43 is that a committee directed payment of a dividend of $1.39 a share on the preferred stock outstanding December 15, 1931 (R. 34) but there is no allegation of how many shares of preferred stock were outstanding on that date, and so there is no basis for computing the amount of the dividend authorized or paid. The Circuit Court of Appeals is in error when it says that the complaint "discloses facts from which the amount of a paid dividend may be determined." R. 362.

It is not enough that a complaint contains a formal allegation of jurisdictional amount. It must allege facts showing that the amount in controversy exceeds $3,000.00. *Smith* v. *McCullough,* 270 U. S. 456, 459; *Norton* v. *Larney,* 266 U. S. 511, 515; *Mutual Life Ins. Co.* v. *Thompson,* 27 Fed. (2nd) 753, 754. It must affirmatively and distinctly appear from the facts alleged and not by inference or argument that the necessary amount is involved. *Hanford* v. *Davies,* 163 U. S. 273, 280; *Wolfe* v. *Hartford Life & Annuity Ins. Co.,* 148 U. S. 389.

We respectfully submit that the Circuit Court of Appeals is in error when it uses "plaintiffs' counter motions, answers on facts and proposed amendments" to bolster up the original complaint. (R. 362.) It is well established that on a motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiffs. *Mutual Life Ins. Co.* v. *Thompson,* 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke,* 10 Fed. (2nd) 3, 7; *United States* v. *Linn,* 42 U. S. 104, 111. Plaintiffs cannot supply deficiencies in their complaint by the affidavit of Mr. Jacobson as to the amount of any dividend that was paid. It is essential that the complaint itself set forth sufficient facts to show the necessary jurisdictional amount. This it does not do. It states, (par. 44, R. 34) "the exact amounts of which cash dividends are unknown to plaintiffs". On this ground of failure to allege facts as to amount involved to show jurisdiction in a federal court the complaint was properly dismissed.

III.

The plaintiffs were collusively selected to create an appearance of diversity of citizenship which does not in fact exist.

The Circuit Court of Appeals says "The record presents a situation where certain creditors having a justifiable interest in the controversy agreed that several members of their class would cause the suit to be commenced in order to confer federal jurisdiction." (R. 362.) If the record supported this statement of fact then *New Albany Waterworks* v. *Louisville Banking Co.,* 122 F. 776, 779; *Hutchinson Box Board and Paper Co.* v. *Van Horn,* 299 F. 424, 429 and *Matter of Reisenberg,* 208 U. S. 90, 111, would be in point. But it does not and the cases do not support the Court's conclusion.

In the cases cited by the Court the parties who were actually interested in the alleged cause of action agreed among themselves to cause the suit to be commenced in the name of and carried on by some of their number for the benefit of all. There the interested litigants selected the named plaintiffs so that diversity of citizenship would appear between the plaintiffs and the defendants, and it is held under those circumstances that this did not constitute such collusion as would cause the federal courts to refuse to entertain the suits.

In the case at bar the record establishes without dispute that *none of the debenture holders who were non-residents of Illinois had any knowledge of the selection of the named plaintiffs, or of the commencement of this suit until after the suit had been commenced.* In their answer to this point of the verified amended motion to dismiss, the attorneys for plaintiffs admit that one-third of the group that had employed them to collect the amount due on the debentures held by the members of the group were citizens of Illinois (R. 247); that each member of the group signed a separate copy of the uniform contract under which the attorneys were employed (for form see R. 467); that the attorneys, not the debenture holders, decided to institute the suit in the federal courts (Rec. 248); and that the secretary of the incorporated litigating committee, not the debenture holders, after consulting with said attorneys, selected the names of the plaintiffs from the non-resident signers of the contracts for the purpose of filing this suit in the Federal court (R. 249). On the hearing the secretary of this corporation admitted that not one of the plaintiffs in whose names suit was brought ever conferred with the attorneys who claimed to represent plaintiffs or with any member of the committee that assumes to speak for plaintiffs, or with the secretary of this incorporated committee, that made the selection of plaintiffs from citizens outside of Illinois.

(R. 480.) All of the officers of this Illinois corporation, organized to conduct litigation, were residents of Illinois. Not even the plaintiffs had anything to do with their selection, and not even they knew anything about the filing of the complaint until after it had been filed. (R. 481.) The chairman of this litigating committee testified that he had no contact with any of the non-resident members of the committee relative to the filing of this suit, that he had nothing to do with the selection of the persons whose names were used as plaintiffs, and that the first time he learned how they were selected was on the hearing in the District Court seven years after the suit was commenced. R. 483.

These admitted facts bring the case squarely within the rule stated in *Southern Realty Investment Co.* v. *Walker*, 211 U. S. 603; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181; *Quincy* v. *Steel*, 120 U. S. 241, 248; *Cashman* v. *A. & S. Canal Co.*, 118 U. S. 58, 61; *Detroit* v. *Dean*, 106 U. S. 537, and *Cerri* v. *Akron-People's Telephone Co.*, 219 Fed. 285. These suits were dismissed because of collusion to create an appearance of diversity of citizenship.

We respectfully submit that there is no basis in the record for the finding of the Circuit Court of Appeals that the creditors agreed that certain members of their class would cause this suit to be commenced. (R. 362.) The undisputed evidence is that the non-resident creditors were not consulted about the commencement of the suit and knew nothing about its commencement until after the complaint had been filed. (R. 480.) On the hearing one of the plaintiffs' attorneys frankly admitted to the Court that the selection of the persons to be used as plaintiffs was made under the direction of the attorneys from the debenture holders who were not residents of Illinois in order that jurisdiction might be conferred on the Federal Court (R. 484) and he also admitted that the attorneys had had no consultation with the non-resident creditors respect-

ing the filing of this suit against former directors or the use of their names as plaintiffs prior to the commencement of the suit. (R. 487.) They assumed to act under the authority granted by the Uniform Contracts which by the very terms thereof gave no such authority.

"When the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed." *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181. This collusive selection of plaintiffs is alone a sufficient ground for the dismissal of this suit. True diversity of citizenship is not present and there is no jurisdiction in the Federal courts.

IV.

Plaintiffs' attorneys failed to sustain the burden of showing that they had authority to commence this suit against former directors of I.U.I. A suit commenced without authority cannot be prosecuted even where plaintiffs ratify the commencement of the suit.

Plaintiffs' attorneys in their answer to the rule to show their authority, state that they commenced this suit by virtue of authority conferred on them by the Uniform Contract, separate copies of which were signed by some 953 non-resident debenture holders and 534 debenture holders residing in Illinois. (R. 474.) Paragraph 1 of this contract employs them "to collect all moneys due upon the Insull Utility Investments, Inc. Debentures listed below the name of the undersigned." (R. 467.) Paragraph 2, on which they particularly rely, authorizes the attorneys to participate in any suit that they "may deem advisable in furtherance of such collections." R. 467.

The debentures were contracts between the holders and the corporation. The directors were not parties to the debentures and there was no privity of contract between the holders and the directors. These attorneys were employed only to further the collection of moneys due upon the debentures and this is a far cry from giving them authority to sue the former directors for some supposed cause of action for alleged wrongful payment of dividends. If an attorney were employed to bring an action on a note no one would assume that he had authority to bring a penal action against some person who was not a party to the note.

There is a presumption that an attorney has the authority to commence a suit, but when that authority is put in issue, the burden is on the attorney to show his authority. This is nothing but elementary law of agency. A court may at any time require an attorney to show his authority to appear for a client. *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 319; *Bell* v. *Farwell,* 189 Ill. 414, 419-424; *Town of Kankakee* v. *Kankakee & Indiana R. Co.,* 115 Ill. 88, 92.

A complaint filed by an attorney without authority is not the commencement of a suit. Where the power of the Court is illegally called into exercise the plaintiff cannot give life to the void act of the attorney by thereafter approving what the attorney has already done without authority. A defendant cannot be made to answer a suit illegally commenced. This point is squarely decided in *Frye* v. *County of Calhoun,* 14 Ill. 131, where the Court says (p. 133):

> "The process of the courts is not to be issued except at the instance of a suitor. It must be demanded by him in person, or by his authorized attorney. A defendant is not bound to answer to the merits of a suit commenced without authority from the plaintiff. Otherwise, he might be twice compelled to litigate the same cause of action. A judgment in his

favor in a suit prosecuted without authority, would be no bar to a second action brought by the direction of the plaintiff.

"The fact that some of the judgment creditors subsequently approved of this unauthorized act of the solicitor, does not change the legal character of the case. *The true question is, Whether he had authority at the time to commence the suit for them, and not whether they afterwards approved of what he had done.* The power of the court was illegally called into exercise by him, and the law will not suffer them to profit thereby against the objections of the defendants. The latter were improperly brought before the court, and they had a clear right to be discharged." (Our italics.)

The Circuit Court of Appeals says that plaintiffs' attorneys were authorized by the employment contract to institute all proceedings deemed advisable in furtherance of the collection of "all moneys due the debenture holders." (R. 362.) If this were the fact we would not be making the point. Plaintiffs' attorneys admit that their only authority to institute this suit is the uniform contract, about 1500 counterparts of which were secured by mail solicitation. This contract says as plainly as the English language can express an agreement that the attorneys are employed "to collect all moneys due upon the Insull Utility Investments, Inc. Debentures". Authority to collect the money due "upon the debentures" is quite a different thing from authority to collect "all moneys due the debenture holders" from any source. By the very language of the contract authority is limited to the collection of moneys due upon the debentures. *This suit which the attorneys filed is one upon an alleged statutory liability and not one upon the debentures.*

The attorneys in their answer to the rule admit that they received no instructions from the named plaintiffs other than is set forth in the uniform contract. (R. 475.) The first twenty-four named plaintiffs were never notified of the filing of this complaint on February 3, 1933. (R. 474.) There was mailed to the last named five, after the filing of the complaint, a letter dated February 4, 1933 which said among other things: "It was necessary to file this suit yesterday and we take this means of notifying you that you have been selected as one of the twenty-nine plaintiffs pursuant to the authority granted the attorneys in paragraph 2 of the uniform contract with debenture holders." (R. 475.) These letters did not give the title or number of the case, but assuming that plaintiffs learned of the commencement of this suit and that they did not protest the use of their names, under the specific language of the Illinois Supreme Court in *Frye* v. *Calhoun,* 14 Ill. 131, 133, ratification by silence is not a justification for bringing the suit without the advance authority or consent of the plaintiffs.

The Circuit Court of Appeals did not make the investigation of this point that the law requires, but contented itself with saying that "The District Court investigated this matter thoroughly and concluded that attorneys for plaintiffs had authority to prosecute these proceedings" and then concluded "We see no reason for disturbing this conclusion." We direct attention to the fact that Judge Wilkerson heard the testimony on this branch of the case but did not decide the question. However during the hearing he did comment that it would be "a rather far-fetched ruling" to hold that the contract authorized the filing of this suit. (R. 486.) When the case was decided by Judge Briggle he had disposed of the case in favor of the defendants on other grounds and it was not necessary for him to decide this question. We do not know how

much consideration he gave to this point, but his memoranda of decision would indicate that it was only casual. (R. 297.) Whatever consideration the District Court gave to the point, we respectfully submit that defendants are entitled to a full re-examination of the matter by this Court. *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 319. If this suit was commenced without authority it must be dismissed.

We present this contention in all earnestness. We think a mere reading of the contract under which these attorneys claim to receive their authority to commence this suit is a conclusive answer to their claim. They admit they have no other authority than the contracts which were solicited in connection with the bankruptcy proceeding.

V.

The second motion for summary judgment should have been allowed. The settlement with and release of the four co-defendant directors, against whom exactly the same charges were made as are made against these remaining defendants, effected a discharge of all defendant directors for all causes of action alleged. The fact that the settlement agreement took the form of a covenant not to sue is immaterial. They paid $50,000 for the release, the suit was dismissed, and the Statute of Limitations barred commencing another.

When this suit was commenced by plaintiffs there were included among the defendants Walter S. Brewster, Waldo F. Tobey, Louis A. Ferguson, and Britton I. Budd, other former directors, the first of whom had been a member of both the Executive Committee and the Finance Committee. All of the acts of wrongdoing charged against the present defendants (cross-petitioners here) as directors were

charged against the settling defendants. In 1937, while the case was pending below, a settlement was made by the attorney for plaintiffs under which these defendants paid varying amounts, totaling $50,000, and the case was dismissed as to them. The remaining defendants, by their amended motion to dismiss (R. 215) and by their second motion for summary judgment (R. 284) claimed this resulted in a complete settlement of all causes of action and, therefore, released all former directors.

The instrument executed in effecting this settlement was in the form of a covenant not to sue, (R. 269-271,) and this plaintiffs contend saves their case against other alleged joint wrongdoers. R. 242-246.

We submit that no man of experience is credulous enough to believe that these four defendants paid to the attorney for plaintiffs $50,000 just for a contract that they would not be sued. There cannot be the slightest doubt that there was a complete settlement of the causes of action against these four defendants and that the attorney for plaintiffs convinced them that the payment of $50,000 would free them from any further liability. A suit brought at this late date would be barred by laches and the Statute of Limitations. It is obvious to anyone facing the realities that the four defendants who paid the $50,000 have been released from all liability on account of their acts as directors of I.U.I.

It is important here to again examine the power of attorney under which Lewis F. Jacobson pretended to act when he accepted the $50,000 from the settling directors and delivered to them agreements in the form of covenants not to sue, on behalf of the debenture-holders whom he claimed to represent, including the plaintiffs, and on behalf of the attorneys for these debenture-holders. This power of attorney authorized Jacobson "to execute and

acknoweldge any document or instrument whatsoever in furtherance of the collection of money due on said debentures, including the execution and vertification of a proof of claim in bankruptcy'' and also ''to collect, receive and account for all moneys due the undersigned on said debentures, including the execution and verification of a proof amount due on said debentures.'' (R. 467.) It will be observed that there is no authority given to Jacobson to receive moneys for covenants not to sue, nor is the authority given to him to execute such covenants on behalf of the debenture-holders whom he claims to represent. *The only authority given is to collect and account for all money due on the debentures, or to compromise the amount due and collect and account for a part.* Acting pursuant to that authority, Jacobson compromised with and collected $50,000 from four of the defendants and dismissed the case as to them.

This was a settlement of the cause of action against these four defendants regardless of the form of the settlement contract. The other defendants are not bound by the attempt to reserve the cause of action against them. Under the well-established law of Illinois and of most other American jurisdictions, when the cause of action is compromised, settled and released as to one or more of several joint wrongdoers, there is no cause of action left and no suit can be maintained against those with whom settlement is made or against any other persons alleged to have acted with them in the commission of the wrong. The fact that the instrument of settlement takes the form of a covenant not to sue is immaterial if all the circumstances show there was in fact a release. *City of Chicago* v. *Babcock*, 143 Ill. 358, 366; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Vigeant* v. *Scully*, 35 Ill. App. 44, 47. It is the settled law of Illinois that when one of several alleged joint wrongdoers is released

all are released. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151.

CONCLUSION.

The Circuit Court of Appeals has wholly disregarded the Illinois decisions and decisions of this Court on the phase of the case presented by this cross-petition for writ of certiorari. It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers over the judgments and decrees of the Circuit Courts of Appeals in order that the errors committed by the Circuit Court of Appeals of the Seventh Circuit may be corrected. That these cross-petitioners may have the benefit of the rights to which they are entitled under the established law, this cross-petition should be granted and this Honorable Court should review the decision of the Circuit Court of Appeals and enter its judgment affirming the decree of the District Court in all respects.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

No. 824

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

SAMUEL INSULL, JR., et al.,
Cross-Petitioners,

vs.

DE MET'S INCORPORATED,
Cross-Respondent.

Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

CROSS-PETITION.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

No. .....

SAMUEL INSULL, JR., et al., Cross-Petitioners, vs. DE MET'S INCORPORATED, Cross-Respondent.	Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Cross-Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

Samuel Insull, Jr., H. L. Stuart, Edward J. Doyle, F. K. Shrader and C. W. Sills respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit directing that Court to certify to this Honorable Court the record in the case of *De Met's Incorporated, Plaintiff-Appellant,* v. *Samuel Insull, Jr., et al., Defendants-Appellees,* No. 7431 in that Court, in order that the decision and judgment of said Court rendered October 1, 1941, may be reviewed in so far as the Circuit Court of Appeals reversed the decree of the District Court for the Northern District of Illinois.

On this day De Met's Incorporated, and Robert E. Wood representing intervenors, filed a petition for a writ of certiorari to said Circuit Court of Appeals in this case, accompanied by a transcript of the record from said Court, seeking to have this Court review that portion of the

decision and judgment of said Court which affirmed the decree of the District Court. These cross-petitioners will oppose the petition of De Met's Incorporated and others on the ground that the Circuit Court of Appeals was right in so far as it affirmed the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A., Sec. 347.) This cause originated in the United States District Court for the Northern District of Illinois and was reviewed on appeal by the United States Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals was filed August 22, 1941, but petitions for rehearing were filed and denied, and final judgment was entered October 1, 1941. R. 343, 405.

Statement of the Case.

This action was brought in January, 1933, to recover damages from the former directors of Corporation Securities Co. of Chicago, (hereinafter called "Corp.") after the bankruptcy of that corporation which occurred in April, 1932. The complaint was filed in equity and purported to be a class suit brought by the Delaware corporation as holder of certain serial gold notes of Corp., on behalf of itself and "all other owners and holders of such other notes similarly situated, and all other creditors who desire to join in this proceeding and share the costs and expenses thereof." (R. 2.)

One asserted ground of liability was the alleged violation of Section 23 of the 1919 General Corporation Act of Illinois by the "board of directors" in that it "authorized or ratified" the declaration of dividends by Corp. during the

years 1930, 1931 and 1932 when it had "no actual surplus." In so far as the complaint relates to this alleged cause of action, it alleges merely* that there was in force during the period involved said Section 23, which provides that "directors" shall be jointly and severally liable for "declaring or assenting to a dividend" if the corporation is or is thereby rendered insolvent or its capital is thereby impaired (Par. 32); that at no time between January 1, 1930, and April 16, 1932, did the company have any actual surplus and that the company did not have cash income for any year in excess of its cash expenses and interest charges for that year (Par. 22); that the company had no surplus at any time during the years 1930, 1931 and 1932, but the "company" paid cash dividends during each of these three years on all classes of its preferred stock, the exact amounts of which cash dividends are unknown to plaintiff (Par. 33); and that the "board of directors authorized or ratified" the payment of dividends, thereby rendering "themselves" jointly and severally liable within the purview of the statute to the plaintiff and all other creditors and holders of contracts with the company. Par. 34.

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* 22. At no time between January 1, 1930 and April 16, 1932, did the company have any actual surplus whatsoever. The books of the company, when the irregularities set forth above are corrected, show that the company did not have, and the company did not in fact have, cash income for any year in excess of its cash expenses and interest charges for that year.

32. During all of the period of the existence of Corporation Securities Co. of Chicago, there has been in full force and effect a certain statute of the State of Illinois known as Section 23 of the General Corporation Act, which is in words and figures as follows:

"The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases:

(1) For assenting to an indebtedness in excess of the amount of the capital of the corporation, to the amount of

(*Footnote continued on pages 4 and 5*)

This case was presented to the District Court and is now before this Court as to the cause of action relating to alleged wrongful payment of dividends on motions to dismiss filed in 1933, which set forth that the complaint does not state a cause of action for payment of dividends contrary to the statute. (R. 17, 21, 24, 31.) Among the grounds set forth are:

> 1. A suit under Section 23 of the old General Corporation Act of Illinois must be brought on behalf of *all* creditors, whereas this suit is brought on behalf only of plaintiff and such other creditors as elect to join and share the costs and expenses;
>
> 2. Said Section 23 is unconstitutional because it is beyond the power of the legislature to declare a *conclusive* presumption of fact, as this section purports to do in the last paragraph, which provides: "Unless a director was absent from the meeting at which such dividend was declared, * * * or unless his dissent therefrom shall be entered on the corporate records he shall be conclusively presumed to have assented thereto";

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such excess; provided no director shall be liable under this clause (1) of this section if at the time such indebtedness is incurred, the value of the assets of the corporation as a going concern is greater than the amount of such indebtedness, including in such assets the assets acquired with or resulting from the incurring of such indebtedness; but not including in such assets good will or any sum therefor;

(2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend;

(3) For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.

For the purposes of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding.

3. The Illinois statute is penal in character and will not be enforced in Federal equity courts;

4. The complaint does not contain the essential allegation that the defendants or any of them, as directors of the corporation, *declared* or *assented to* the payment of any dividend;

5. The complaint does not allege facts which show that the corporation was insolvent at the time any dividend was declared or that the payment of any dividend rendered the corporation insolvent or that such payment impaired its capital.

The District Court dismissed the complaint as to this cause of action basing its decision only on the ground of insufficiency of allegations to state a cause of action. (Opinion, R. 298-299; Decree, R. 317.) The Circuit Court of Appeals reversed the judgment of the District Court as to this cause of action and held that the complaint was sufficient. R. 346.

A further ground of insufficiency of the complaint is that it fails to allege *facts* which show that the requisite jurisdictional amount is present. The only allegations as

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Unless a director was absent from the meeting at which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto."

33. As hereinabove set forth, the company had no surplus at any time during the years 1930, 1931 and 1932. Nevertheless, the company paid cash dividends during each of these three years on all classes of its Preferred Stock, the exact amounts of which cash dividends are unknown to the plaintiff.

34. The Board of Directors authorized or ratified the payment of dividends as set forth above, thereby rendering themselves jointly and severally liable, within the purview of the Statute of the State of Illinois, set forth above, to the plaintiff, and all other creditors and holders of contracts of the company.

to amount involved appear in Paragraphs 4 and 10. Paragraph 4 merely makes the general statement that more than $3,000 is involved. (R. 3.) Paragraph 10 alleges merely that plaintiff owned notes of the face amount of $20,000 when it filed the complaint. (R. 6.) Paragraphs 33 and 34, which are the only paragraphs of the complaint relating to the payment of dividends, make no suggestion of the amount involved. (R. 12.) In fact, it is alleged in Paragraph 33, "the exact amounts of which cash dividends are unknown to the plaintiff."

The Circuit Court of Appeals ignored this point but sustained the complaint as to the cause of action relating to alleged wrongful payment of dividends, thereby holding in effect that the complaint alleged facts showing that the requisite jurisdictional amount is involved.

The Contested Issues.

As to the matters presented by this cross-petition the following questions arise:

(a) Whether the complaint alleges facts sufficient to show the requisite jurisdictional amount is involved.

(b) Whether the complaint alleges facts which state a cause of action against these cross-petitioners for declaring and assenting to the payment of dividends in violation of Section 23 of the old General Corporation Act of Illinois.

(c) Whether said Section 23 is constitutional.

(d) Whether this alleged cause of action for illegal payment of dividends can be maintained on behalf only of such creditors as join in the proceeding and share the expenses thereof.

(e) Whether the District Court properly denied the filing of the proffered amendments to the complaint.

(f) Whether plaintiff can maintain this suit in the absence of an allegation that it owned notes when the alleged wrongs were committed.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in conflict with applicable decisions of the Supreme Court of Illinois.

(a) When the Circuit Court of Appeals held "that a corporate director participates in a dividend, that is, declares or assents to a dividend, under the statute, if he votes to give such an executive committee the power to declare a dividend and this is done, if he himself is an active member of the executive committee which declares a dividend, or if he approves, ratifies or assents to a declaration of the executive committee," it assumed facts which do not appear on the face of the complaint and it announced rules of law in conflict with the decision of the Supreme Court of Illinois in *Lewis* v. *Montgomery*, 145 Ill. 30.

(b) When the Circuit Court of Appeals held, by adoption of its ruling in the companion case of *Aiken et al.* v. *Insull et al.*, that "the word 'assenting' includes the approval and declaration of a dividend after it has been declared," it held squarely against the Supreme Court of Illinois which has decided that "assenting," as used in the General Corporation Act of 1919, means assenting to the creation of the obligation, and that a recognition of the obligation after it has been contracted does not have the effect of charging a director with the statutory liability. *Lewis* v. *Montgomery*, 145 Ill. 30, 47.

(c) The Circuit Court of Appeals held contrary to the Illinois law when it held that the executive com-

mittee of Corp. was the agent of the board of directors in the declaration of dividends. *Lewis* v. *Montgomery,* 145 Ill. 30, 46.

(d) Since the original complaint did not state a cause of action with respect to improper payment of dividends, the new cause of action alleged in the proposed amendments, if a cause of action is alleged, is barred by the Statute of Limitations. *Allis-Chalmers Manufacturing Co.* v. *City of Chicago,* 297 Ill. 444; *Board of Education* v. *Blodgett,* 155 Ill. 441.

2. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal law in conflict with applicable decisions of this Court and with its own decisions and with decisions of other Circuit Courts of Appeals.

(a) The construction placed on Section 23 of the 1919 General Corporation Act of Illinois by the Circuit Court of Appeals in this case extends the statute by construction to embrace cases not within its terms, contrary to the rule applied by the same Circuit Court of Appeals in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.,* 268 Fed. 525, 527.

(b) The District Court ruled in accordance with the established practice in denying amendments offered seven years after the suit was commenced and nine years after the occurrences out of which the alleged cause of action arose. *National Bank* v. *Carpenter,* 101 U. S. 567, 568; *United States* v. *First Wisconsin Trust Co.,* 92 Fed. (2nd) 840, 844.

(c) The law is established that the requisite jurisdictional amount must affirmatively and distinctly appear from the allegations of the complaint and that a defect in such allegations cannot be helped by presumptions or by argumentative inferences drawn from the

pleadings. There is no allegation in the complaint at bar of the *amount* of any dividend paid nor are there facts alleged from which the amount may be determined. The decision in this case is contrary to the rule in *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Smith* v. *McCullough*, 270 U. S. 456, 459; *Norton* v. *Larney*, 266 U. S. 511, 515; *Hanford* v. *Davies*, 163 U. S. 273, 280.

(d) Since plaintiff has not by its allegations shown that the alleged wrongs occurred while plaintiff was the owner of notes it cannot maintain this suit. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629.

(e) The Circuit Court of Appeals was in error when it went outside the complaint and used the proposed amendments to bolster up the original complaint. It is established that on motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111.

Respectfully submitted,

Conrad H. Poppenhusen,
Edward R. Johnston,
Floyd E. Thompson,
11 South La Salle Street, Chicago,

John J. Healy,
135 South La Salle Street, Chicago,
Solicitors for Samuel Insull, Jr., H. L. Stuart, Edward J. Doyle, F. K. Shrader and C. W. Sills, Cross Petitioners.

ARGUMENT IN SUPPORT OF CROSS-PETITION.

I.

The complaint did not state a cause of action against the defendants for alleged wrongful payment of dividends.

We present this point first because it is the ground on which the District Court dismissed the complaint as to the alleged cause of action against the former directors of Corporation Securities Co. of Chicago for declaring or assenting to the payment of a dividend in violation of section 23 of the General Corporation Act of Illinois of 1919, which was repealed by the Business Corporation Act of Illinois of 1933. We shall undertake to show that the holding of the District Court is in accord with the established law of Illinois as declared by the Supreme Court of Illinois and as applied by the Federal Courts of the Seventh Circuit.

There is no allegation in the complaint that any of these defendants (cross-petitioners here) *declared* or *assented to* any dividend at any time. The complaint merely alleges (Par. 33, R. 12) that "the company paid cash dividends" and (Par. 34, Rec. 12) that "the board of directors authorized or ratified the payment of dividends."

There is no allegation that either Samuel Insull, Jr., or H. L. Stuart or E. J. Doyle or F. K. Shrader or C. W. Sills attended any meeting of the board of directors at which action on dividends was taken. Not one of these defendants is mentioned by name except in the title and in the prayer of the complaint. There were *eleven* directors of this corporation (R. 2) and the six directors, *excluding the five who present this cross-petition*, could have taken the action necessary to cause the company to pay dividends.

It was this uncertainty of the allegations of this complaint that caused Judge Briggle to say, (R. 299):

> "The liability under the statute must be predicated upon the individual director having declared or assented to a dividend, and it is not enough to say that the company or the board or the committee declared a dividend. It would be a dangerous theory of law if an individual director were to be held liable for some misfeasance or malfeasance related to his conduct as a director without the assertion of some fact to show wrong on the part of the specific director involved."

This is sound reasoning supported by all authorities on pleading. It is well established that on a motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111. We deem the failure of the plaintiff to allege that any of the *present defendants* ever *declared* or *assented to* the payment of a dividend by the corporation to be conclusive against the sufficiency of the complaint.

The allegations are wholly insufficient to state a cause of action under the Illinois statute in other respects. No facts are alleged to show what dividends were paid, or when they were paid, or that the corporation was insolvent when any dividend was paid, or that it was rendered insolvent by any such payment, or that its capital was thus impaired. The allegations of the complaint are mere conclusions of the pleader, unsupported by facts (Par. 22, R. 10; Par. 33, R. 12). It is a sound rule of pleading, especially on motions to dismiss, that ambiguities and uncertainties in pleadings are to be construed most strongly against the pleader. *United States* v. *Linn*, 42 U. S. 104, 111; *Coffey* v. *Colonial Trust Co.*, 50 Fed. (2nd) 313, 314.

We respectfully submit that the legal conclusions stated in the next to the last paragraph of the opinion of the Circuit Court of Appeals (R. 346) are squarely in conflict with the construction placed upon the General Corporation Act by the Supreme Court of Illinois in *Lewis* v. *Montgomery*, 145 Ill. 30. The Circuit Court of Appeals holds that an executive committee of a corporation is the agent of the board of directors, whereas the Illinois Supreme Court holds just the opposite in the cited case, saying at p. 46:

> "The directors though the governing body of the corporation are only its officers and agents and any subordinate agent appointed by them or acting by virtue of their sufferance or recognition does not thereby become their agent but the agent of the corporation. His acts are the acts of the corporation so as to make it liable for debts or obligations incurred by him on its behalf, but they are not the acts of the directors unless commanded or authorized by them."

The Circuit Court of Appeals holds that a director declares or assents to a dividend under the statute if he approves or ratifies a declaration of a dividend by an executive committee, whereas the Illinois Supreme Court holds directly to the contrary in the cited case, saying at p. 47:

> "The liability is created only where the indebtedness of the corporation exceeds the amount of the capital stock and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors after it has been so contracted as to become binding upon the corporation, should not have the effect of charging them with this statutory liability."

The same Circuit Court of Appeals in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525, recognized that the rules of construction declared by the Illinois Su-

preme Court in *Lewis* v. *Montgomery* to apply to section 16 of the Illinois statute dealing with directors' liability for assenting to indebtedness in excess of the capital stock, apply to section 19 of the statute providing for liability of directors for declaring or assenting to dividends in violation of the statute, saying p. 527:

> "Even if section 19 is held not to be a penal statute, it must at least be said that the liability imposed is like that of a surety, *stricti juris*. *Woolverton* v. *Taylor*, 132 Ill. 197. The liability imposed under section 19 is much more extreme and severe than that imposed under section 16. In *Lewis* v. *Montgomery*, 145 Ill. 30, 47, in construing section 16, it was said:
>
> 'The words employed * * * should not be extended by construction, so as to embrace cases not clearly within the terms of the statute.' "

But an equally serious objection to the conclusion reached by the Circuit Court of Appeals is that *facts are assumed* which do not appear from the allegations in the complaint. Nowhere in the complaint is it stated that there was an executive committee of Corp. or that the board of directors empowered an executive committee to declare dividends or that any of the present defendants were on an executive committee or that any of these defendants were present at a board meeting which empowered an executive committee to declare dividends. Thus is appears that the Circuit Court of Appeals goes beyond the four corners of the complaint for facts when it says in its opinion (R. 346): "In the instant case the board of directors empowered an executive committee to declare dividends."

It also appears that the Circuit Court of Appeals is assuming facts *not alleged* when it states (R. 346):

> "We believe that a corporate director participates in a dividend, that is, declares or assents to a dividend,

> under the statute if he votes to give such an executive committee the power to declare a dividend, and this is done if he himself is an active member of the executive committee which declares a dividend, or if he approves, ratifies or assents to a declaration of the executive committee."

We think the opinion of the Circuit Court of Appeals clearly reveals that the Court confused the allegations of the complaint in this case filed in 1933, which is the pleading being tested by the motions to dismiss filed shortly thereafter, with the allegations of amendments to the complaint which were presented in 1940, more than eight years after the dates of the challenged transactions.

Another ground of insufficiency of the complaint is that the suit is not brought by plaintiff on behalf of *all* creditors. That the liability under section 23 is personal to the creditors and that a suit to enforce the liability must be brought by one or more creditors on behalf of all creditors is established by *Ryerson & Son* v. *Peden,* 303 Ill. 171, 184; *Seegmiller* v. *Day,* 249 Fed. 177, 179; and *Pollard* v. *Bailey,* 20 Wall. 520, 527. This suit is brought by plaintiff on its own behalf as a holder of corporate notes and on behalf of other holders of such notes similarly situated and all other creditors who desired to join in the suit and share the costs and expenses thereof (R. 2). Certain noteholders represented by General Robert E. Wood intervened, but there are many that did not elect to join in the proceeding and make themselves liable for costs and expenses of this suit. When this suit was filed the banks and others besides noteholders had claims aggregating some $25,000,000. We think it is clear from the allegations of the complaint that it was never intended by plaintiff to include the banks as its co-plaintiffs. Since this suit was not brought on behalf of all creditors it cannot be maintained as a suit under the Illinois statute.

Another defect in the complaint that is fatal to the maintenance of this suit by plaintiff or intervenors (cross-respondents here) is that it is nowhere alleged that they were creditors of the corporation *at the time* the dividends were declared and paid. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629; *Buell* v. *Lanski*, 232 Ill. App. 500, 511. Whether plaintiff extended credit to the corporation or whether it bought its notes in the open market for a nominal sum after the corporation was in bankruptcy does not appear from the allegations of the complaint. Plaintiff says it owned notes of the face amount of $20,000 when it filed the complaint (Par. 10, R. 6), but it does not allege when it acquired these notes, except that it acquired them before maturity which may have been any time before the suit was commenced; nor what it paid for them except that it was something of value; nor that it owned them when the challenged transactions took place. If it bought its notes after the alleged wrongful dividends were paid and got them at a price which took into account the depleted assets of the corporation, it cannot now sue for wrongs which caused it no injury. Courts do not countenance speculation by litigation.

If this action for improper payment of dividends were brought on behalf of all creditors of the corporation and the complaint otherwise alleged a case within the terms of the statute and this plaintiff was in position to maintain the suit, it could not be maintained because the statute on which it is based is unconstitutional. The last paragraph of the statute provides, "Unless a director was absent from the meeting at which such dividend was declared, * * * or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." It is beyond the power of the legislature to declare a *conclusive* presumption. Such an

attempt is an invasion of the judicial field and violates Section 2 of Article II and Article III of the State Constitution and the Fourteenth Amendment to the Federal Constitution. (*Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62, 70; *People* v. *Rose*, 207 Ill. 352, 361; *Hall* v. *Woods*, 325 Ill. 114, 144; *Heiner* v. *Donnan*, 285 U. S. 312, 329. This provision of Section 23 creating a conclusive presumption being unconstitutional, it follows that subdivision 2 of this section, of which this invalid provision is an essential and integral part, is likewise invalid. (*Chicago Motor Club* v. *Kinney*, 329 Ill. 120, 134; *Springfield Gas Co.* v. *Springfield*, 292 Ill. 236, 243.) The Supreme Court of Illinois decided, under the Illinois Corporation Act prior to the revision thereof in 1919, that a director could only be held liable for the violation of the statute when the evidence showed that he had consciously approved or participated in the wrongful act. (*Lewis* v. *Montgomery*, 145 Ill. 30,) and the Federal courts in Illinois gave this statute the same construction. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525; *Chick* v. *Fuller*, 114 Fed. 22, 29.) The very purpose of the addition of the conclusive presumption clause in 1919 was to change this rule of evidence.

The provision of Section 23 under consideration is a penal statute. It in effect *prohibits* declaration of a dividend which will render the corporation insolvent or which will impair the capital of the corporation. It *punishes* directors for violation of their duties to the corporation and its stockholders and creditors. (*Vestal* v. *Robertson*, 277 Ill. 425, 430; *Patterson* v. *Thompson*, 86 Fed. 85, 86.) Inasmuch as liability sought to be created by the section is penal in character, a suit cannot be maintained in equity to enforce such liability. (*Loverin* v. *McLaughlin*, 161 Ill. 417, 435; *Robson* v. *Doyle*, 191 Ill. 566, 570.) The Federal courts will not enforce a penal law of Illinois. *Gwin* v. *Breedlove*, 43 U. S. 29, 37; *Sherman* v. *Gassett*, 4 Gil. 521.

For all these reasons the District Court properly dismissed the cause of action for wrongful payment of dividends. While it based its decision only on the ground of insufficiency of the complaint to state a cause of action, the decree will be sustained if any ground appearing of record is sound. The Circuit Court of Appeals erred in holding the original complaint sufficient and in reversing the decree of the District Court.

We respectfully submit that under the authorities the District Court properly refused the amendment to the complaint not only because it was presented too late, (*National Bank* v. *Carpenter*, 101 U. S. 567, 568, *L. E. Whitham Construction Co.* v. *Remer*, 105 Fed. (2nd) 371) but also because it failed to state a cause of action. (*Lewis* v. *Montgomery*, 145 Ill. 30, 47.) The allowance of an application to amend rests in the discretion of the trial court and its order denying the application will not be reversed unless there is an abuse. *United States* v. *First Wisconsin Trust Co.*, 92 Fed. (2nd) 840, 844; *Davis* v. *Virginia Ry. & Power Co.*, 229 Fed. 633, 639.

These defendants filed their motions to dismiss in 1933 (R. 17-38) and these motions were continued generally on the motion of plaintiff on January 19, 1934. (Aiken R. 58.) The case lay dormant for more than six years. In 1939 defendants took steps which stirred plaintiffs to action. The proposed amendments were offered March 1, 1940, (R. 300) more than seven years after the complaint was filed. The District Court ruled in accordance with established practice regarding tardy amendments. The Circuit Court of Appeals ruled directly contrary to the spirit of the established law as well as the new Federal Rules of Civil Procedure which stress dispatch of business of the courts and require diligence on the part of litigants.

Since the original complaint did not state a cause of action, the new cause of action alleged in the amendments,

if a cause of action is alleged, is barred by the Statute of Limitations. (*N. & G. Taylor Co.* v. *Anderson,* 275 U. S. 431, 438; *Allis-Chalmers Co.* v. *City of Chicago,* 297 Ill. 444, 449. Under Illinois law this completed bar is a vested right which is protected by the Constitution. *Board of Education* v. *Blodgett,* 155 Ill. 441; *Hanley* v. *Waters,* 255 Ill. App. 239.

Even the proposed amendment did not state a cause of action. *No director is charged with declaring or assenting to any dividend.* It is merely charged that "the executive committee" *declared* certain dividends (Par. 7, R. 305) and that these "defendants" thereafter *ratified* the action of this executive committee. (Par. 1, R. 301-303). The executive committee was composed of four of the directors (Par. 6, R. 305). Of these Samuel Insull and M. J. Insull were never served. Only Samuel Insull Jr. and H. L. Stuart of those now before the court were on the executive committee. Their acts as members of this committee were not acts *as directors.* As committeemen, they were agents of the corporation and not of the board of directors. *Lewis* v. *Montgomery,* 145 Ill. 30, 47. Neither defendant Doyle nor Shrader nor Sills were on the executive committee. An examination of the proposed amendment will show that on no occasion is it alleged that either Doyle or Shrader or Sills *declared* or *assented to* a dividend in any capacity. It is alleged merely that they *ratified* what the executive committee had already done,—Doyle on six occasions (par. 1 (f), (h), (j), (l), (n), (p)); Shrader on two (Par. 1 (b), (f)) and Sills on three Par. 1 (b), (f), (l)) (R. 301-303). The amendment shows that the five defendants (cross-petitioners here) *as directors* of the corporation merely *ratified* what the executive committee had already done and so serves to show that there is no cause of action under the Illinois statute against these defendants, or any of them,

for wrongfully *declaring* or *assenting to* a dividend, which is what the statute makes actionable. *Lewis* v. *Montgomery*, 145 Ill. 30, 47.

II.

The complaint fails to allege facts which show that the requisite jurisdictional amount is involved.

The only paragraphs of the complaint which state any amount are paragraphs 4 and 10. Paragraph 4 consists merely of the general statement that more than $3,000 is involved (R. 3). Paragraph 10 alleges merely that plaintiff owned notes of the face amount of $20,000 when it filed the complaint (R. 6) but it does not allege what plaintiff paid for these notes except that it was something of value, nor that plaintiff has been damaged to an amount in excess of $3,000 or in any other amount. *There is no allegation anywhere in the complaint from which it is possible to determine the amount of any dividend that was declared or paid.* In fact it is alleged in paragraph 33, "the exact amounts of which cash dividends are unknown to the plaintiff" (R. 12). An examination of paragraphs 33 and 34, which are the only paragraphs of the complaint relating to the payment of dividends, will not reveal even a suggestion of the amount involved much less that the amount exceeds $3,000.

It is not enough that a complaint contain a formal allegation of jurisdictional amount. It must allege facts showing that the amount in controversy exceeds $3,000. *Smith* v. *McCullough*, 270 U. S. 456, 459; *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Woods* v. *Thompson*, 14 Fed. (2nd) 951, 952. It must affirmatively and distinctly appear from the facts alleged and not by inference or argument that the necessary amount is involved. *Norton*

v. *Larney*, 266 U. S. 511, 515; *Hanford* v. *Davies*, 163 U. S. 273, 280; *Wolfe* v. *Hartford Life & Annuity Ins. Co.*, 148 U. S. 389. If the requisite jurisdictional amount does not appear from the allegations of the complaint the case must be dismissed. *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 86; *Pianta* v. *Reich Co.*, 77 Fed. (2nd) 888, 890.

The Circuit Court of Appeals does not discuss this point in its opinion in this case but disposes of the point by mere general reference to its opinion in *Aiken* v. *Insull* (R. 344). Since that Court refers to the proposed amendments in the *Aiken* case to bolster up the original complaint (R. 357) it must have referred to the proposed amendments in this case to get even a suggestion of the amount involved. It is well established that on a motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111. It is essential that the complaint itself sets forth sufficient facts to show the necessary jurisdictional amount and the Circuit Court of Appeals was in error when it went outside of the complaint to find the essential allegations of fact.

Plaintiff alleges that it owned notes when it filed the complaint in 1933 (Par. 10, R. 6) but it does not allege *when* it acquired these notes, except that it acquired them before maturity which may have been any time before the suit was commenced. There is no allegation that plaintiff owned these notes when the challenged declaration of dividends took place. There being no allegation that any wrong was committed *by any defendant* at any time *when plaintiff owned notes*, there is no allegation of any injury *in any amount* to the named plaintiff or to any intervenor or to any present creditor.

On this ground of failure to allege facts to show jurisdiction in a Federal court the complaint was properly dismissed.

CONCLUSION.

The Circuit Court of Appeals has wholly disregarded the Illinois decisions and decisions of this Court on the phase of the case presented by this cross-petition for writ of certiorari. It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers over the judgments and decrees of the Circuit Court of Appeals in order that the errors committed by the Circuit Court of Appeals may be corrected. That these cross-petitioners may have the benefit of the rights to which they are entitled under established law, this cross-petition should be granted and this Honorable Court should review the decision of the Circuit Court of Appeals and enter its judgment affirming the decree of the District Court in all respects.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

No. 821

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

THOMAS D. AIKEN, ET AL.,
Plaintiffs-Petitioners,

VS.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

Answer to Petition for Writ of Certiorari.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Respondents.

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Answer to Petition for Writ of Certiorari.

To the Honorable The Supreme Court of the United States:

The petitioners have not made an accurate statement of the case.

The statement that Insull Utility Investments, Inc. was organized by present defendants (respondents here) (Pet. 3) is not supported by the record. The allegation of the complaint (Par. 5, R. 3-5) is that the company was organized by Samuel Insull, now deceased, in the fall of 1928. Thereafter, in 1929, present defendants were elected directors of the company. Par. 8, R. 5.

The record does not support the statement that the public utility companies of the Insull Group, in the shares

of which I.U.I. made substantial investments, were "under the direction and management of the defendants". (Pet. 3.) There is no allegation anywhere in the complaint that respondents, H. L. Stuart or Stuyvesant Peabody, had anything to do with the operation of any of these public utility companies at any time.

In stating the covenant of the debentures, (Pet. 3) petitioners omit the exceptions to the restrictions on pledging which are that "the Company without so securing this debenture (a) may at any time mortgage or pledge any of its property for the purpose of securing loans to the Company contracted in the usual course of business for periods not exceeding one year, and (b) may in order to secure the purchase price or part thereof of any property which it may hereafter acquire, mortgage or pledge any or all of such acquired property." R. 8-9, 14.

It is not true that "shortly after I.U.I. was organized, the defendant directors caused I.U.I. to pledge substantially all its assets to secure loans." (Pet. 4.) I.U.I. was an investment company organized "to acquire, dispose of, underwrite and deal in securities, and do a general investment business", (R. 3,) and borrowing money to make investments was in the usual course of its business. The facts alleged in Paragraph 30 (R. 24-32) show that the first loan was made April 14, 1930, when $2,500,000 was borrowed from the Continental Bank, and that the last loan was made December 22, 1931, when a loan of $500,000 was made by the General Electric Company. All the loans were for short periods and there were many renewals. It is alleged in Paragraph 34 (R. 32) that as late as May 15, 1931, the value of the assets of I.U.I. was approximately $193,000,000 and its outstanding obligations were approximately $98,000,000. It is clear from the allegations of the complaint that when the original loans were made they were small when compared with

the assets of the company and that the drastic decline in market value of securities brought about by the cataclysmic world-wide economic depression and not the original borrowing and pledging caused the bankruptcy of I.U.I.

After I.U.I. went into bankruptcy a score of suits were filed against the banks by the trustee in bankruptcy and by different groups of debenture-holders. (R. 116-128.) By their suits the debenture-holders sought decrees against the banks to compel surrender of all notes of I.U.I. and of all collateral pledged and for an accounting. (R. 112.) After negotiation it was agreed that all claims of the debenture-holders and the trustee in bankruptcy be compromised and settled. (R. 137.) A decree was entered in chancery confirming in the banks title to the collateral pledged with them, free from all claims asserted or assertable by the debenture-holders or the trustee arising out of or in any manner connected with the pledging, (R. 175,) and permanently enjoining the debenture-holders from instituting or prosecuting any suits against the banks on account of such pledgings. (R. 177.) An order was entered in bankruptcy reciting that the settlement had been fully carried out by the payment by the banks of $3,435,088.07 and the performance of other terms of the settlement "in full settlement and compromise of all claims involved" in all of the pending suits, (R. 196,) and ordering that the acts of the trustee in bankruptcy in carrying out the settlement be approved and that he deliver releases to all of the banks. R. 197.

It is not true that the banks agreed that the cause of action against the former directors of I.U.I. should not be affected by the settlement. (Pet. 5.) The debenture-holders as petitioners made the assertion in their petition for approval of the settlement that the release of the banks should not release former directors of the company (R.

143) but this attempted reservation of a cause of action against the former directors was not made a condition of the effectiveness of the release of the banks.

Reasons for Denial of the Writ.

1. The decision of the Circuit Court of Appeals with respect to the release of the alleged cause of action against the former directors of I.U.I. arising out of the alleged pledging of assets by I.U.I. in violation of debenture covenants, by virtue of the release of the banks for their participation in said pledging, follows the decisions of the courts of Illinois. Under the settled law of Illinois the release of the settling banks released the former directors of I.U.I. as to all causes of action asserted or which might have been asserted by the debenture-holders for or on account of the alleged wrongful pledging of the assets of I.U.I. as collateral to the bank loans. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Guth* v. *Vaughan*, 231 Ill. App. 143; *Killham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Gore* v. *Henrotin*, 165 Ill. App. 222, 224; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50.

This rule that where two or more persons each contribute to cause a single injury the release of one releases all is not only the settled law of Illinois but it is the law of most if not all American jurisdictions. *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383; *Smith* v. *Mann*, 184 Minn. 485, 239 N. W. 223, 224; *Muse* v. *DeVito*, 243 Mass. 384, 137 N. E. 730, 731; *Lanasa* v. *Beggs*, 159 Md. 311, 151 Atl. 21, 25; *Abb* v. *Northern Pacific Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 955; *Chetwood* v. *California National Bank*, 113 Cal. 414, 45 Pac. 704, 706; *Sircey* v. *Hans Rees Sons*, 155 N. C. 296, 71 S. E. 310, 311; *McBride* v. *Scott*, 132 Mich. 176, 93 N. W. 243, 244; *Gholson* v. *Savin*, (Ohio.) 31 N. E. (2nd) 858, 863; *Bronson* v. *Fitzhugh*, 1

Hill (N. Y.) 185; *Kaplowitz* v. *Kay,* 70 Fed. (2nd) 782, 783; *Spiess* v. *Sommarstrom Ship Bldg. Co.,* 272 Fed. 109, 111.

Furthermore the settling debenture-holders released the cause of action against the former directors of I.U.I. by an election of substantive rights in making their settlement with the banks. *Birdsell Manufacturing Co.* v. *Oglevee,* 187 Ill. 149, 153; *Gibbs* v. *Redman Fireproof Storage Co.,* 68 Utah 298, 249 Pac. 1032; *MacDonald* v. *Hornblower & Weeks,* 268 Mich. 626, 256 N. W. 572; *DeCock* v. *O'Connell,* 188 Minn. 228, 246 N. W. 885, 887; *Fowler* v. *Bowery Savings Bank,* 113 N. Y. 450, 21 N. E. 172.

Parmelee v. *Lawrence,* 44 Ill. 405, and other cases relied on by petitioners are clearly distinguishable because they apply only to joint obligor cases where there is the right of contribution.

2. The rule of release established by the Illinois decisions and applied by the Circuit Court of Appeals in this case is founded on sound public policy and is a salutary rule of law. *Chapin* v. *C. & E. I. Ry. Co.,* 18 Ill. App. 47, 50, citing *Brown* v. *City of Cambridge,* 85 Mass. 474, 475; *Farmers' Savings Bank* v. *Aldrich,* 153 Ia. 144, 133 N. W. 383, 386; *Rust* v. *Schlaitzer,* 175 Wash. 331, 27 Pac. (2nd) 571, 573; *Sircey* v. *Hans Rees Sons,* 155 N. C. 296, 71 S. E. 310, 311; *McBride* v. *Scott,* 132 Mich. 176, 93 N. W. 243, 245.

3. The former directors of I.U.I. did not stand in the relation of trustees to the debenture-holders. *People* v. *Superior Court,* 359 Ill. 612, 619; *Becker* v. *Billings,* 304 Ill. 190, 198; *Gottlieb* v. *Miller,* 154 Ill. 44, 50; *Briggs* v. *Spaulding,* 141 U. S. 132, 147; *Van Weel* v. *Winston,* 115 U. S. 228, 245; *Webb* v. *Cash,* 35 Wyo. 398, 250 Pac. 1, 8; *Hart* v. *Evanson,* 14 N. D. 570, 105 N. W. 942, 943.

But if I.U.I. stood in the relation of a trustee to the debenture-holders and if it violated its duty by pledging its assets, then all who acted with I.U.I. in breaching its trust are liable jointly and severally for the wrong, and so the release of one would release all. *First & Merchants National Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *Braswell* v. *Morrow*, 195 N. C. 127, 141 S. E. 489, 491; *Whitford* v. *Reddeman*, 196 Wis. 10, 219 N. W. 361; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034.

4. The decisions in *Kelly* v. *Central Hanover Bank & Trust Co.*, 11 Fed. Supp. 497, and in 85 Fed. (2nd) 61, are based on a failure of proof after a trial and can have no application to the case at bar which presents entirely different issues on different pleadings. We have here the effect of a comprehensive and unconditional release of some of several alleged joint wrongdoers. The legal effect of the release of the settling banks cannot be explained away nor can the debenture-holders, after accepting the benefits of the settlement, make the excuse that the banks were not in fact wrongdoers. *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 51; *Guth* v. *Vaughan*, 231 Ill. App. 143; *C. C. C. & St. L. Ry. Co.* v. *Hilligoss*, 171 Ind. 417, 86 N. E. 485, 488; *Martin* v. *Setter*, 184 Minn. 457, 239 N. W. 219, 222; *Kirkland* v. *Ensign-Bickford Co.*, 267 Fed. 472, 475.

5. The Circuit Court of Appeals does not hold that the banks and the former directors of I.U.I. were jointly liable as tort feasors and it is the settled law of Illinois that the application of the rule of release of all by the release of some of several alleged joint wrongdoers is not confined to cases where the alleged wrongdoers are jointly liable. The rule applies where all contributed to the same injury even though they acted severally. *Chapin* v. *C. &*

E. I. Ry. Co., 18 Ill. App. 47, 50; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Wagner* v. *C. & A. R. Co.*, 265 Ill. 245, 251; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Muse* v. *DeVito*, 243 Mass. 384, 137 N. E. 730, 731.

6. The separate point with respect to the release of the New York banks is an afterthought. It was not presented to the District Court for decision and there is no assignment of error on the record which presented the point to the Circuit Court of Appeals. Furthermore, the assumed facts from which the argument is made are not supported by the record.

7. The statement that the decree approving the settlement with the banks was entered on the express condition that the cause of action against the former directors of I.U.I. would be preserved is directly contrary to the facts. It is immaterial that the settling debenture-holders who petitioned for the decree intended to release only the banks. There is no dispute among the authorities that where there is an absolute and unconditional release of one of several alleged wrongdoers it operates to release all who participated in the same act. *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Bee* v. *Cooper*, 217 Cal. 96, 17 Pac. (2nd) 740, 741; *McBride* v. *Scott*, 132 Mich. 176, 93 N. W. 243, 244; *Rust* v. *Schlaitzer*, 175 Wash. 331, 27 Pac. (2nd) 571; *Thompson* v. *Fox*, 326 Pa. 209, 192 Atl. 107, 109; *Ducey* v. *Patterson*, 37 Colo. 216, 86 Pac. 109; *Gholson* v. *Savin*, (Ohio,) 31 N. E. (2nd) 858, 863.

In addition to the grounds assigned by the District Court and the Circuit Court of Appeals in sustaining the motion for summary judgment there are other equally well-sup-

ported grounds why a decree for defendants must be entered with respect to the alleged cause of action grounded on the pledging of assets of I.U.I. as security for bank loans.

8. The complaint fails to allege facts which show that the requisite jurisdictional amount is involved. This is not a true class action, (*Ayer* v. *Kemper*, 48 Fed. (2nd) 11, 14,) and the amounts of the separate claims of the plaintiff debenture-holders cannot be combined to create the necessary jurisdictional amount. (*Pinel* v. *Pinel*, 240 U.S. 594, 596; *Clay* v. *Field*, 138 U.S. 464, 479.) The complaint must affirmatively and positively allege facts which show that the jurisdictional amount is present and the allegations cannot be helped by presumptions or argumentative inferences. (*Norton* v. *Larney*, 266 U.S. 511, 515; *Hanford* v. *Davies*, 163 U.S. 273, 280.) There is no allegation in the complaint that any plaintiff was a creditor at the time of the alleged wrongful borrowings and pledgings, and so there is no allegation of any injury in any amount to any plaintiff. (*Graham* v. *Railroad Co.*, 102 U.S. 148, 153; *Chicago News Co.* v. *Siegel*, 212 Ill. 617, 629.) A spurious class suit must be dismissed as to each plaintiff who does not individually and severally allege affirmatively and distinctly that he has a claim in excess of $3,000. *Ogden* v. *Armstrong*, 168 U.S. 224, 232; *Russell* v. *Stansell*, 105 U.S. 303, 304.

9. The plaintiffs were collusively selected to create an appearance of diversity of citizenship which does not in fact exist. No debenture-holder who resided outside Illinois was consulted respecting the institution of this suit or the selection of the plaintiffs in whose names the suit was instituted. This ground of lack of jurisdiction supports the decree dismissing the suit. *Southern Realty Investment Co.* v. *Walker*, 211 U.S. 603; *Detroit* v. *Dean*, 106

U.S. 537, 541; *Quincy* v. *Steel*, 120 U.S. 241, 248; *Cerri* v. *Akron-People's Telephone Co.*, 219 Fed. 285.

10. The authority of plaintiffs' attorneys to institute and prosecute this suit was appropriately challenged and they failed to sustain the burden of showing that they had authority to commence this suit against the former directors of I.U.I. Their only authority was to sue to collect moneys due upon the debentures. No named plaintiff knew that the suit against these defendants had been commenced until after the complaint had been filed. A suit commenced without authority cannot be prosecuted even where plaintiffs acquiesce or attempt to ratify the commencement of the suit. *Frye* v. *County of Calhoun*, 14 Ill. 131, 132; *Town of Kankakee* v. *Kankakee & Indiana R. Co.*, 115 Ill. 88, 92; *Bell* v. *Farwell*, 189 Ill. 414, 417; *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 319; *Sutherland* v. *International Insurance Co.*, 43 Fed. (2nd) 969, 972.

11. The facts alleged in the complaint do not state a cause of action against the former directors of I.U.I. or any of them on account of the alleged violation of the debenture covenants in pledging assets as security for bank loans. The complaint states mere conclusions as to those matters which are essential to state a cause of action for wrongful pledging. (*Van Weel* v. *Winston*, 115 U.S. 228, 237; *Sterling Gas Co.* v. *Higby*, 134 Ill. 557, 568; *Bosworth* v. *Van Lanningham*, 293 Fed. 875, 877.) There is no allegation that any of the indebtedness for which a pledge was made was created after the debentures were issued. Renewals of notes are merely extensions of time of payment and not the creation of new indebtedness. *Kelly* v. *Central Hanover Bank & Trust Co.*, 11 Fed. Supp. 497, 504; *Griffin* v. *Long*, 96 Ark. 268, 131 S.W. 672, 673; *Phoenix Bank* v. *Martin*, 219 Ky. 579, 293 S.W. 1064, 1067; *Poughkeepsie* v. *Quintard*, 136 N.Y. 275, 32 N.E. 764.

12. Plaintiffs became creditors of I.U.I. by purchasing its debentures. In each debenture was a provision that all liability of the directors for the payment of the debenture was waived and released by the holders of the debentures. This no recourse provision precludes any recovery by plaintiffs against defendants as former directors for the payment of the debentures or any part thereof. *Continental Corp.* v. *Gowdy*, 283 Mass. 204, 186 N.E. 244, 246; *Marfield* v. *Cincinnati D. & T. Traction Co.*, 111 Ohio 139, 144 N.E. 689, 691; *Babbitt* v. *Read*, 215 Fed. 395, 417, affirmed in 236 Fed. 42.

13. In addition to the settlement with the banks, plaintiff debenture-holders settled with four co-defendant directors and dismissed the suit as to them after the Statute of Limitations barred the commencement of a new suit. This settlement with and release of some former directors, who were charged with identically the same wrongs as are charged against present defendants, effected a discharge of all former directors for all causes of action alleged. The fact that this settlement agreement took the form of a covenant not to sue is immaterial. *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Bee* v. *Cooper*, 217 Cal. 96, 17 Pac. (2nd) 740; *Lanasa* v. *Beggs*, 159 Md. 311, 151 Atl. 21, 25; *Rust* v. *Schlaitzer*, 175 Wash. 331, 27 Pac. (2nd) 571, 573.

14. These respondents may sustain the decree of the District Court upon any ground warranted by the record, though they may wish to show that the District Court might have based its decree on different and additional grounds and that the Circuit Court of Appeals might have affirmed on different and additional grounds. (*McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434; *Langnes* v. *Green*, 282 U.S. 531; *Mattingly* v. *Northwestern Virginia R. Co.*, 158 U.S. 53, 57; *Hülmer* v. *Chicago Bank of Commerce*, 375 Ill. 266, 272.) It is the con-

sidered opinion of counsel for respondents that the grounds assigned by the District Court as the basis for its decree and the grounds assigned by the Circuit Court of Appeals as the basis for its judgment in so far as it affirmed the decree of the District Court are sound, and that the petition should be denied for the reasons assigned in Points 1 to 7, *supra*. In addition to the sound reasons assigned for the decision in favor of respondents, there are other reasons equally sound which require that the petition be denied, which reasons are set forth in Points 8 to 13, *supra*.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The conclusion reached by the District Court and the Circuit Court of Appeals that the release and discharge of the banks operated to release and discharge the former directors of I.U.I. from all liability for the alleged wrongful pledging is fully supported by the established law and sound logic.

A.

The argument of plaintiffs' counsel is based on the erroneous assumption of fact that the release of the banks was conditioned upon the reservation of the cause of action against the former directors of I.U.I.

An examination of the proceedings of the United States District Court and the settlement papers which appear as exhibits to the motion for summary judgment will disclose that the assumption of fact made by plaintiffs' counsel that the release of the banks was conditioned on the reservation of some cause of action against the former directors of I.U.I. is without foundation and that the whole argument resting on this false premise falls of its own weight.

After describing the score of suits pending in the Federal courts of New York and Illinois against the New York and Chicago banks by the debenture-holders and the trustee in bankruptcy of I.U.I. (Pars. 1-6, R. 116-122; Pars. 8-10, R. 125-126), and the extensive negotiations between the attorneys for the creditors and the trustee and

the attorneys for the banks (Par. 25, R. 136), the petition states that the debenture holders had agreed to compromise and settle their claims which had been asserted or which were assertable against the banks in the various pending equity suits as well as the claims of the trustee in bankruptcy in the several pending preference suits. (Par. 26.) There is no suggestion here that the settlement was other than absolute and unconditional. (R. 137.) The whole argument of plaintiffs' counsel rests upon their construction of Sub-Paragraph K of Paragraph 26. There is not a suggestion in this paragraph or in anything that precedes it that the attempted limitation of the effect of the release of the banks should be a condition of the settlement with the banks. The paragraph is just an announcement of the hope of the petitioners that the release of the banks would not be construed as a release of former officers or directors of I.U.I. (R. 143.) There is nothing in the record to show that the banks agreed to this attempted reservation as a limitation of the effect of the release to be given to them upon the consummation of the settlement arrangement. The banks were not parties to the petition. There was no answer to the petition by the New York banks, and the Chicago banks by their answer merely admitted that the allegations of the petition that a settlement had been reached were true. Ex. D, R. 162-165.

The decree approving settlement (Ex. F, R. 172-174), the decree in chancery confirming settlement (Ex. G, R. 174-194), and the order in bankruptcy confirming settlement (Ex. H, R. 195-199), were obviously agreed orders. They must have been drafted by plaintiffs' counsel and approved by the banks' counsel. *The Court will search these decretal orders in vain for even a suggestion of the reservation of the alleged cause of action against the former directors of I.U.I.* Obviously, the banks would not have permitted this attempted reservation to be made a con-

dition of the effectiveness of the release given to them. The final decree in chancery and the final order in bankruptcy confirming the settlement show that the settlement with the banks was unconditional and that the release given to the banks was absolute and contained no attempted reservation of any pretended cause of action against any officer or director of I.U.I. The Court will notice that the final orders entered February 24, 1938, not only released the banks of all claims, demands and causes of action which had been asserted against them in the scores of suits pending in the Federal courts of New York and Illinois, but they released all claims, demands and causes of action which might have been asserted against the banks by debenture-holders or the trustee in bankruptcy of I.U.I. respecting liability of the banks for making loans to and receiving collateral from the corporation in violation of the debenture covenants. (R. 175, 197.) To make the release of the banks doubly certain, all debenture-holders and the trustee in bankruptcy and all parties claiming through them were permanently enjoined from ever instituting any action against said banks on account of any matter involved in the bank suits or upon or in connection with the debentures. R. 177.

B.

The release of the banks from all liability for their part in effecting a pledge of the assets of I.U.I. in alleged breach of the debenture covenants likewise released the former directors of I.U.I.

We do not believe that anyone will seriously contend that the settling banks could not plead the settlement and release in bar of any action which might be brought against them for alleged breach of the covenants of I.U.I. debentures in connection with the deposit of collateral as security for the loans made by the banks to the corporation.

It is so held by the District Court (R. 293) and the Circuit Court of Appeals. (R. 357.) This being established, it follows as night the day that the release of the banks also released the former directors of the corporation for their participation in the commission of the alleged wrong. There is not a case in Illinois which departs from the rule that if there is an actual release of the cause of action against one or more of several joint wrongdoers the cause of action is released against the others. A few of the Illinois cases are *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Mooney* v. *City of Chicago*, 239 Ill. 414, 423; *City of Chicago* v. *Babcock*, 143 Ill. 358, 366; *Emory* v. *Addis*, 71 Ill. 273, 277; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Killham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. R. Co.*, 18 Ill. App. 47, 50. It is universally held that the absolute release of one or more of several joint wrongdoers releases all the rest of them and that an unconditional and consummated settlement with one or more of such wrongdoers is a bar to a suit against any of the rest of them.

In applying the Illinois decisions to the case at bar, we must keep in mind the fact that there was an absolute and unconditional discharge of the banks from all asserted or assertable liability. Certainly, in the light of the final orders entered by the District Court in chancery and in bankruptcy, these plaintiffs or any of the other debenture-holders could not revive any of the many suits against the banks. If any debenture-holder attempted to prosecute any of these suits against the banks, the banks could plead the release as a bar and the debenture-holder would subject himself to prosecution for contempt of court for violating the injunction permanently restraining prosecution of the suits against the banks. This situation was brought about by the action of plaintiffs and the debenture-holders

represented by them in the bank suits. They asked the Court to approve the compromise which released and discharged the banks. They asked the Court to restrain all debenture-holders from prosecuting any suit against the banks for their part in the transactions which they asserted had resulted in a great loss to them. These defendant directors had no part in releasing the banks from this alleged liability and they were not consulted about it during the negotiations for settlement nor were they before the Court in the proceedings which concluded the settlement with and discharge of the banks. Plaintiffs created the situation which they now seek to avoid.

C.

The rule that the release of one of several joint tort feasors releases all of them applies even where there is a reserved intention to look to others for further compensation.

Plaintiffs' counsel, in their petition (p. 27) challenge us "to cite a single case of the Supreme or Appellate Courts of Illinois deciding that in spite of a clause in a release reserving the cause of action against the other joint tort feasors, the reservation clause will be given no effect and the other joint tort feasors will be released." We have met the challenge in the group of cases cited under the preceding point and we could cite many more cases announcing the same rule. The Illinois courts, without exception, state that "the release of one alleged joint tort feasor releases all," and they attach no provisos to the rule. If the joint tort feasor is released, he is released; and the fact that the settling claimant tells the settling defendant that he proposes to sue someone else notwithstanding he is releasing the settling defendant does not limit the legal effect of the release.

Stanley v. *Leahy*, 87 Ill. App. 465, 467, states directly and in unequivocal language that it makes no difference that

the settling claimant intended to release only some of the alleged wrongdoers. Plaintiffs' counsel undertakes to distinguish this case by saying that it involved the sufficiency of a pleading in which plaintiff said merely that she did not intend to release all of the accused when she released some of them, but said nothing to indicate that she expressed this intention to the settling tort feasors. The Court places no such limitation upon its language. It recognizes that neither logic nor law would support a conclusion that makes the rule of release dependent upon a self-serving arrangement by the settling claimant. All of the argument of counsel cannot change the fact that the Illinois Court in this case held squarely and unequivocally that it was altogether immaterial whether the settling plaintiff intended to release all of the wrongdoers by releasing some of them, because it recognized that under the settled law of Illinois all joint tort feasors were released upon the release of one regardless of the intention or agreement of the settling parties to release only some of them.

City of Chicago v. *Babcock*, 143 Ill. 358, makes the situation as to the law in Illinois perfectly clear. There the Court says (p. 366) that "A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others." The Court then points out that a covenant not to sue is different from a release and does not operate as a discharge of anyone. *As far as Illinois law is concerned, the situation comes down to this: if one is released, all are released; if all are not released, then none is released.* The banks being released, (as the District Court (R. 293) and the Circuit Court of Appeals (R. 357) squarely hold,) then all who acted with the banks in the commission of the alleged wrong are released.

Another Illinois case which holds squarely that the release of one joint tort feasor releases all, notwithstanding the instrument of settlement is cast in the form of a covenant not to sue, is *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312. There the Court seemed to apply the rule which is stated in Section 886 of Restatement of Torts: "The discharge or satisfaction of a judgment against one of several persons, each of whom is liable for a single harm, discharges each of the others from liability therefor." We think that this rule of the Restatement is applicable to the case at bar. The legal effect of the court proceedings which carried out the settlement was a finding by the Court that the banks should cancel their claims and the claims of others filed against the bankrupt estate, aggregating $71,979,083.95, and that they should pay $3,435,088.07 as compensation to the debenture-holders and the bankrupt estate. (R. 138-141.) The final decree entered February 24, 1938, found that the settlement as outlined in the petition had been fully consummated and that the banks had paid the settlement fund and it enjoined the prosecution of any claim against the banks. (R. 177.) The order in bankruptcy entered on the same date found that the banks had paid the amount agreed to be due "in full settlement and compromise of all claims involved," in all the suits against the banks. (R. 196.) The situation is exactly the same as if the case had been tried and the Court had made a finding which resulted in a decree against the banks to cancel their claims and to pay the amount agreed to be paid to the debenture-holders and the trustee in bankruptcy of I.U.I., and the banks had paid the amount decreed and carried out the other terms of the decree. There seems to be no exception to the rule, as stated in Restatement of Torts (Sec. 886), that the discharge or satisfaction of a judgment against one of several persons, each of whom is liable for a single harm, discharges each of the others from liability therefor. The comment on the

section says that the payment of the judgment by one of the wrongdoers, which is accepted by the claimant, discharges the other wrongdoers, even where no judgment has been obtained against the others.

We do not understand that plaintiffs' counsel claim that the debenture-holders could sue the banks again or that their claims against the banks remain in any respect unsettled or unsatisfied. All we understand the claim of plaintiffs' counsel to be is that, the banks having had notice that plaintiffs did not intend to release the former directors of I.U.I. by the release of the banks, the cause of action against present defendants is in some way preserved. We have exactly this situation in *Brown* v. *City of Cambridge*, 85 Mass. 474, quoted with approval in *Chapin* v. *C. & E. I. R. Co.*, 18 Ill. App. 47. The Supreme Judicial Court of Massachusetts, in disposing of the contention of plaintiff in that case that his release of the Cambridge Water Works did not release the City of Cambridge for an alleged wrong, to which both corporations had contributed, because he had told the attorneys for the Water Works that his release of the Water Works did not release the City, said respecting the evidence of this attempted reservation (p. 475):

> "It did not prove that the plaintiff reserved a right to sue the Cambridge Water Works again, or that his claim against them remained in any respect unsettled or unsatisfied. It amounted merely to this: that the plaintiff's counsel at the time of the settlement asserted an intention to sue the City of Cambridge for the tort, and the counsel of the Water Works made no objection to his doing so.
>
> "The defendants contend that the legal effect of this transaction is to discharge them also, and we are of opinion that it has that effect. It is an ancient doctrine that a release to one joint trespasser, or a satisfaction from him, discharges the whole. * * * If it

were not so, a party having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages; he might then sue another and settle in the same way, and repeat the proceeding as to all but one, and then sue him and recover the whole damage, as if nothing had been paid by the others. A door would thus be opened to a class of speculations that do not deserve encouragement. The rule of law which makes one satisfaction or release a bar to further claims for the same tort is founded in good reason."

Ellis v. *Bitzer*, 2 Ohio 89, 15 Am. Dec. 534, 537, cited with approval in *Vigeant* v. *Scully*, 35 Ill. App. 44, 47, says on this subject:

"That a release of one of several joint trespassers operates a discharge of all, is a position too clear to admit of doubt. * * * Each joint trespasser being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole trespass, and a discharge of all concerned. * * * The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge."

The law of Illinois is squarely against the contentions of petitioners' counsel. We are supported in this view by the decision of two distinguished Illinois lawyers who served for many years on the State bench prior to their appointment to the Federal bench,—Hon. Charles G. Briggle of the United States District Court for the Southern District of Illinois, formerly Judge of the Circuit Court

of the Seventh Judicial Circuit, and Hon. Otto Kerner of the United States Circuit Court of Appeals for the Seventh Circuit, formerly Judge of the Circuit Court of Cook County and by appointment by the Supreme Court a Judge of the Appellate Court for the First District of Illinois.

D.

The rule for which we contend is the only rule which has a foundation in sound logic and established law.

The rule applied by the Illinois courts in situations like the one at bar is neither technical nor harsh. It is founded in reason and justice. A tort claim against several joint wrongdoers is indivisible. All joint tort feasors are liable severally and jointly. There is no right of contribution. When the claimant by compromise agrees with one or more of the joint wrongdoers upon the value of his claim and accepts payment and gives a release, the cause of action is gone. It is the same as if no wrong had ever been done. The claimant has no unsatisfied claim upon which he can recover against anyone.

While the courts in Illinois have accepted the well established rule of release of all upon the release of one joint tort feasor, they have never found it necessary to write a treatise in any opinion in defense of the rule. It is only in recent years that there has been any challenge of the soundness of this long established rule. We submit that it is wholly illogical and unjust to make legal rights of one dependent on the agreement of others. By what process of reasoning can it be said that this settlement with and discharge of the banks with Paragraph K excluded releases the former directors, but with Paragraph K included it still releases the banks but does not release the former directors, notwithstanding the former directors were never consulted and had no part in making the settlement. This just does not add up.

The Illinois Appellate Court, in *Vigeant* v. *Scully,* 35 Ill. App. 44, in support of the general rule followed in Illinois, quotes from *Bronson* v. *Fitzhugh,* 1 Hill N. Y. 185, 186, and adopts in part this paragraph:

> "The reason of the rule seems to be, that the deed, being taken most strongly against the releasor, is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort feasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done."

In the same case the Illinois Appellate Court also adopts the language of the Supreme Court of Maine and quotes with approval from *Kilpatrick* v. *Hunter,* 24 Me. 18, as follows:

> "The difficulty in maintaining the suit against the other is, that the law considers that the one who has paid for the injury occasioned by him, and has been discharged, committed the whole trespass and has occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury which he received."

With all deference due those who hold an opposite view, we cannot see how an argument can be made that the rule of release in joint obligor cases should be the same as the rule in joint tort feasor cases. The difference in the two situations is so obvious and is so well grounded in law and logic that we are surprised that the subject should present any problem. In the joint obligor cases the claim is for an established amount and there is the right of contribution, but in the joint tort feasor cases the claim is unliquidated and there is no right of contribution. If A and B owe C $100 on a note and A pays the $100 he has the right

to a contribution of $50 from B. If A pays only $50 and C accepts it in discharge of half of the debt and retains his claim against B for the other half, B's position is not adversely affected by the settlement between A and C. However, if A and B are liable to C for an assault, there is just one liability for which both A and B are fully responsible with no right of contribution. If A and C agree on the amount of A's liability and A pays the amount agreed upon, and C accepts the sum and A is released by C for all liability, there remains no unsatisfied claim on which C can recover from B. C has fixed the value of his claim and sold it. His cause of action is gone. It cannot be revived as to B by an act of C wholly repugnant to his settlement with and discharge of A. The situation after the settlement is the same as if no wrong had ever been done.

Even in joint obligor cases, if the settling defendant received an absolute and unconditional release, it operates to discharge his co-obligors. (*Parmelee* v. *Lawrence,* 44 Ill. 405, 410.) The Circuit Court of Appeals holds, as we think it must hold under the facts, that there can be no real controversy about whether the banks were absolutely and unconditionally released. (R. 357.) Under all Illinois cases it follows that this discharge of the cause of action against the banks constituted a discharge of the cause of action against the former directors of I.U.I., who acted with the banks in the consummation of the alleged wrong, and is a bar to the prosecution of the instant suit against present defendants.

The just and logical rule that the release of one joint tort feasor releases all, which is so thoroughly established by Illinois law, is not a rule peculiar to Illinois courts. It is the rule applied in the great majority of American jurisdictions. "There is scarcely any dispute among the authorities that, where there is an absolute

release of one, it operates to release all tort feasors who participate in the same act." (*Abb* v. *Northern Pacific Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 957.) "The rule as to the effect of a release may at one time have been somewhat technical; but it has been observed and acted upon, not as a technical rule of the common law, but for reasons of sound policy. A claimant should not be allowed to settle with one of the persons liable to him for his entire claim, if it is valid, and then, having received all he has been able to exact from such party, proceed to speculate by litigation with others, who were no more liable than the first." (*Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 386.) "We cannot agree with the learned counsel that the plea of a release is technical and does not present a meritorious defense. Plaintiff thereby acknowledged full satisfaction of his claim, and he is entitled to have no more. Nor can we assent to the suggestion that a plaintiff should be allowed two satisfactions for one and the same demand. Such a doctrine would shock the moral sense and violate a cardinal maxim of the law, if not the defendant's constitutional right." (*Sircey* v. *Hans Rees Sons*, 155 N. C. 296, 71 S. E. 310, 311.) "Under all the authorities, accepting payment from one or releasing one wrongdoer from payment releases all. * * * The theory underlying the statement of the rule is that the claim is one obligation both joint and several, and whenever the obligation is satisfied as to one it is necessarily released as to the other." (*Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1035.) "It is an ancient and well established rule, almost without exception in England and America, that for a single injury there can be but one recompense. * * * Having had a reparation from one who was responsible for all the damage and released him, all others who were jointly or jointly and severally liable are also released." (*C. C. C. & St. L. Ry. Co.* v. *Hilligoss*,

171 Ind. 417, 86 N. E. 485, 487.) "However, the injured person has freedom to contract for satisfaction. * * * Compromise, accord and satisfaction are open to him, and he may waive his cause of action. * * * And, when the cause of action is destroyed as to one tort feasor, it falls as to the others, even though it is attempted to preserve the liability of the others." (*MacDonald* v. *Hornblower & Weeks,* 268 Mich. 626, 256 N. W. 572.) "The effect which the law attaches to a release discharging the liability of a wrongdoer is the release of other tort feasors who are jointly liable for the injury. This rule apparently is based upon the nature of their liability, which is one and indivisible. Accordingly, if one of them is discharged, or satisfies the cause of action, there remains no foundation for an action against anyone." (*Muse* v. *DeVito,* 243 Mass. 384, 137 N. E. 730, 731.) "Plaintiff's general release operated not only *in personam* on the releasees and their liability, but also *in rem* on the releasor's cause of action. * * * The entire cause of action being gone, no one can remain liable." (*Smith* v. *Mann,* 184 Minn. 485, 239 N. W. 223, 224.) "Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. * * * If it [the payment made] be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against them all." *Chetwood* v. *California Natl. Bank,* 113 Cal. 414, 45 Pac. 704, 707.

This rule of release applied by the Illinois courts throughout the history of the State is "the better rule," (*McBride* v. *Scott,* 132 Mich. 176, 93 N. W. 243, 245,) is "founded in good reason", (*Brown* v. *City of Cambridge,* 85 Mass. 474, 476,) and is "a salutary rule of law". (*Rust* v. *Schlaitzer,* 175 Wash. 331, 27 Pac. (2nd) 571, 573.) We ask this Honorable Court to consider that these defendants are not asking for the application of a harsh and

technical rule but for the application of a just and logical rule which was thoroughly established by the courts of Illinois and of most, if not all, of the States of the residence of the debenture holders at the time this settlement was made and the banks were released. The very language of Paragraph K of the petition for approval of the settlement indicates that plaintiffs' counsel were thoroughly familiar with this rule when they advised their clients to accept the settlement with the banks and discharge them from all further liability. The present situation is their own creation. A discharge is a fact which cannot be explained away as against one whose interests may have been affected by it.

II.

The summary judgment motion applies to the liability of defendant directors for pledging of collateral for loans made by the New York banks for the same reason that it applies to the transactions with the Chicago banks.

There are at least three conclusive answers to the argument made by plaintiffs' counsel under Division II. (Pet. 31.)

First: This effort of plaintiffs' counsel to distinguish between the effect of the settlement as to the transactions with the Chicago banks is an afterthought. This point was not made on the hearing in the District Court and so there was no ruling on the point and nothing is preserved for review respecting the point. Furthermore, there is no assignment of error on the record which presented the point to the Circuit Court of Appeals for decision. An examination of the assignment of errors (R. 324-327) will disclose that there is not even a suggestion of this claim of plaintiffs' counsel, advanced for the first time when they filed the brief of appellants in

the Circuit Court of Appeals. In the absence of an assignment of error covering the point, there is nothing before this Court for consideration.

Second: If the point were before the Court, it is without merit because it is based on a false assumption of fact. The Court will note from an examination of the petition for decretal order that the first suit mentioned is No. 12397, which was a suit in equity pending in the United States District Court for the Northern District of Illinois, Eastern Division, brought by plaintiffs against *the five New York banks* and the five Chicago banks and Bigelow, trustee. (R. 116.) The Court will also note that among the New York equity suits, one that was not tried before Judge Mack, is a suit by DeVol pending in the United States District Court for the Southern District of New York against the New York banks, the General Electric Company, and Bigelow, trustee. (R. 122.) This is the same plaintiff who instituted a similar suit in her own behalf and on behalf of debenture-holders who had deposited debentures with the McDevitt-Goldsborough Committee and on behalf of all other owners of I.U.I. debentures in the United States District Court for the Northern District of Illinois against the Chicago banks. (R. 118.) The Illinois suit of present plaintiffs against the New York and Chicago banks and the New York suit by other debenture-holders on behalf of all, including present plaintiffs, against the New York banks, were included in the settlement and were dismissed pursuant to the settlement. (R. 137.) There were also pending in New York against the New York banks five preference suits by Bigelow, trustee (R. 125-126), which were included in the settlement. (R. 137.) The decree in chancery, (R. 174-179,) and the order in bankruptcy, (R. 195-199,) disposed of all pending suits that were described in the petition, which certainly included the half dozen suits pending in New York and the suit pending in Illi-

nois in which the New York banks were named as defendants. In addition to these suits concerning the affairs of I.U.I., there was included in the settlement, disposition of several equity suits pending in New York against the New York banks growing out of the affairs of Corporation Securities Co. of Chicago (R. 129-130), and some preference suits pending in Illinois against the New York banks. (R. 134.) The comprehensive settlement described in the petition covered transactions of the New York and Chicago banks with Corp. as well as those with I.U.I. (R. 136-137.) The petition stated that all claims involved in the New York equity suits as well as the Chicago equity suits would be settled upon the payment in cash of $3,435,088.07 and the withdrawal of claims amounting to $71,979,083.95 by the banks, (R. 137-138,) and that the New York preference suits would be dismissed and releases of all claims against the New York banks and the Chicago banks involved in said suits would be delivered upon the completion of the settlement (R. 141), and that the Court should decree upon the consummation of the settlement "that all claims and suits whatsoever against the Chicago banks and the New York banks or any of them on account of any matter or thing mentioned or involved in said Chicago equity suits or New York equity suits be forever barred, and that all holders and owners of said debentures of Insull Utility Investments, Inc. and said Bigelow as trustee, be enjoined and restrained from instituting any suits at law or in equity against the Chicago banks or the New York banks or any of them, and that the claims of such debenture-holders against the banks be limited to said settlement fund." (R. 147.) The settlement was carried out and confirmed. (R. 174-179; R. 195-199.) Thus it appears that the whole argument of plaintiffs' counsel falls of its own weight because it is not true that all the suits pending against the New York banks had been dis-

missed by the New York District Court before the settlement.

Third: Even as to the six suits against the New York banks which were tried before Judge Mack, plaintiffs still had pending claims. If the appeal from the decision of Judge Mack dismissing their complaints had terminated in favor of the debenture-holders and a new trial had been ordered, there would have been no decree and the debenture-holders would have been restored to exactly the same position they were in before Judge Mack decided the case against them. (*Wright* v. *Griffey*, 47 Ill. App. 577, 578.) Plaintiffs take a strange position in arguing they had no claims against the New York banks after having accepted from them more than a million dollars in settlement of their claims. If there were no suits pending against the New York banks, then why did plaintiffs take money from these banks and give releases pursuant to the settlement agreement which in terms covered pending suits against the New York banks as well as the Chicago banks.

The point has been squarely decided in *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, where the Court said (p. 312):

> "A release of liability of one joint tort feasor will inure to the benefit of the others, either before or after suit is brought and pending judgment or after judgment has been entered, where tortious conduct is made the basis of a claim or action."

III.

The former directors of I.U.I. (respondents here) and the settling pledgee banks acted jointly in the pledging of the assets of I.U.I. and consequently all contributed to the consummation of the wrong to the creditors of I.U.I., if wrong was done. The District Court and the Circuit Court of Appeals, in sustaining the motion for summary judgment, were right in applying the well established rule of release of all by the release of one or more of several alleged joint wrongdoers.

We now come to that phase of the argument of petitioners which amounts to an attempt to show that the settling banks did not contribute to the commission of the wrong for which the debenture-holders seek to recover from the former directors of I.U.I. This is pounding on the log after the coon is gone. It has been repeatedly held that a claimant cannot take the position that one who buys his release is not guilty. When one releases an alleged wrongdoer he cannot explain away the effect of his release nor can he make the excuse that those who settled were not in fact wrongdoers when the release is pleaded as a release of others who contributed to cause the alleged injury.

In *Chapin* v. *C. & E. I. R. Co.*, 18 Ill. App. 47, the Court quotes with approval *Leddy* v. *Barney*, 139 Mass. 394, 2 N. E. 107, as follows (p. 51):

> "The rule that a release of a cause of action to one of several persons liable operates as a release to all, applies to a release given to one against whom a claim is made, although he may not be in fact liable. The validity and effect of a release of a cause of action do not depend upon the validity of a cause of action. If the claim is made against one and is re-

leased, all who may be liable are discharged, whether the one released was liable or not."

Plaintiffs (petitioners here) will not now be permitted to take the position that the settling wrongdoers did not contribute to the injury which it is charged resulted from wrongs committed by present defendants, nor can they explain away the effect of the settlements by claiming that they were collecting for something other than the damages suffered by them. *Guth* v. *Vaughan,* 231 Ill. App. 143; *C. C. C. & St. L. Ry. Co.* v. *Hilligoss,* 171 Ind. 417, 86 N. E. 485, 488; *Martin* v. *Setter,* 184 Minn. 457, 239 N. W. 219, 222; *Allen* v. *Ruland,* 79 Conn. 405, 65 Atl. 138, 140; *Kirkland* v. *Ensign-Bickford Co.,* 267 Fed. 472, 475.

The law fixes the rights of defendants (respondents here) and if there was in fact a release of the settling banks and if these settling banks were in fact actors in the chain of events which resulted in the claimed injury, then these defendants are entitled to the benefit of the releases given to the settling banks by the plaintiffs. *Vigeant* v. *Scully,* 35 Ill. App. 44, 47, citing *Bronson* v. *Fitzhugh,* 1 Hill (N.Y.) 185, 186; *Smith* v. *Mann,* 184 Minn. 485, 239 N.W. 223, 224; *Muse* v. *DeVito,* 243 Mass. 384, 137 N.E. 730; *MacDonald* v. *Hornblower & Weeks,* 268 Mich. 626, 256 N.W. 572; *Kaplowitz* v. *Kay,* 70 Fed. (2nd) 782, 783; *Spiess* v. *Sommarstrom Ship Building Co.,* 272 Fed. 109, 111; *Babcock & Wilcox Co.* v. *Pioneer Iron-Works,* 34 Fed. 338, 341.

People v. *Becker,* 253 Ill. 131, cited by petitioners in support of their contention, merely holds that the satisfaction of a judgment on two state warrants, illegally drawn by the State Auditor to himself and paid to him by the State Treasurer, was not a bar to an action against the estate of the State Treasurer on other warrants drawn by the State Auditor, payable to the State Treasurer, and paid by the State Treasurer to himself. Here we have a

case dealing with two constitutional officers whose respective duties are prescribed by law and who have separate and distinct obligations to the public. In this situation the Court expressly held that the wrongful acts of each officer were several as to the drawing and the paying of the respective warrants and that they were not joint tort feasors.

Veazie v. *Williams*, 49 U.S. 134, another case upon which petitioners rely, merely holds that an arrangement made with an auctioneer, who had defrauded a purchaser by running up the price with fictitious bids, under which the auctioneer testified for the purchaser in his suit against the sellers, was merely a covenant not to sue and was not a release which would bar a suit against those who had benefited by the fraudulent acts of the auctioneer. Petitioners rely on the dictum that the accountability of the sellers and the auctioneer rested on different grounds and that in equity a release of one of them would be limited to the one passing the consideration for the release.

Whatever the law is elsewhere, it is the settled law of Illinois that where two or more persons each contribute to cause a single injury, the release of one releases all. It is immaterial whether they were joint tort feasors. It is enough if they were both liable for the same injury.

One of the early Illinois cases is *Chapin* v. *C.&E.I. R. Co.*, 18 Ill. App. 47, which involved a train collision. There the Court said (p. 50):

> "It is conceded that the action in this case is brought to recover for the same injury for which settlement has been made with the Wabash Company, but it is insisted that the two companies were not joint tort feasors, were therefore not jointly liable, and that the release of one does not have the effect of discharging the other from liability to the plaintiff. Whether

they were joint tort feasors or not, we do not deem it important in the view we take of the case, to decide. It is enough if they were both liable for the same injury. * * * (p. 51) If this be so, then a release to one discharges both."

A second Illinois case is *Vigeant* v. *Scully,* 35 Ill. App. 44, in which Vigeant, an architect, sued for damages alleged to have arisen through his negligence in failing to properly supervise construction of a building, defended on the ground that the judgment in favor of Kaiser, the building contractor, in an action against Scully, the owner, for the amount claimed to be due, to which action Scully had made the defense that Kaiser's work was defective, constituted a release of all who contributed to the alleged wrong. There the question of whether the builder and the architect acted jointly was involved. The Court disposed of it by saying (p. 47):

"If the injury had been caused by the joint negligence of Vigeant and Kaiser, there would be no difficulty whatever in yielding this point, because it is established law that the release of one of two joint wrongdoers, or satisfaction received from one, is a release or satisfaction as to all.

* * *

"Here is a wrong for which two persons are severally, and not jointly, amenable. One of them makes complete reparation. Can the injured party demand anything more from the other tort feasor? The foundation for such a demand would seem to be removed. One atonement is all the law exacts. That having been made, 'it is as though the wrong had never been done'. Those who have acted separately in committing the injury, can be in no worse situation than they who, having acted jointly, are, by the election of the injured person, made separate trespassers."

The complaint against the banks (Ex. A to the motion for summary judgment) alleges that the banks wrongfully made loans to I.U.I. and wrongfully demanded and took pledges of assets of I.U.I., (Pars. 19-20, R. 96-100) and further alleges that the banks were fully informed with respect to the provisions of the debentures and that they knowingly made the loans in violation of the protective covenants, (Pars. 25-34, R. 102-107) and in general alleges that the banks by their wrongful conduct rendered themselves liable to account to the debenture-holders for all of the assets taken by them in pledge and all proceeds thereof and accretions thereto, and prays that there be entered against the banks "a judgment for the full, fair market value of said securities, dividends and accretions as at the highest value thereof at any time subsequent to the wrongful transfer thereof." R. 113.

If it be conceded that I.U.I. stood in the relation of a trustee to the debenture-holders and if the banks, in dealing with I.U.I. assisted it in the violation of its trust, then the banks were liable with I.U.I. and its officers and directors for any injury caused the debenture-holders. It is well established that those dealing with persons acting in a fiduciary character are at all times required to take notice of that fact, and they cannot act for their own advantage in disregard of the fiduciary relation which actually exists. Accepting as true the allegations of the complaint of the debenture-holders against the banks and the allegations of the complaint of the debenture-holders against the former directors of I.U.I., it appears clear that the only alleged wrongdoers who could have had a motive for inducing I.U.I. to make wrongful loans were the banks. It was to the self-interest of the directors to protect I.U.I. from wrongful borrowings and pledgings. There is a complete absence of motive for wrongdoing on the part of the respondents here.

CONCLUSION.

We shall not extend this brief in opposition to the petition for writ of certiorari by presenting an argument in support of all the reasons relied upon to support the decree of the District Court and the judgment of the Circuit Court of Appeals in ruling in favor of the defendants. The reasons assigned in the memoranda of holdings of the District Court (R. 290-294) and in the opinion of the Circuit Court of Appeals (R. 355-357) are sound and well supported by the decisions of the courts of Illinois and of most other American jurisdictions, as we have demonstrated in our argument. But there are other equally strong reasons why the judgment must be for the defendants. The complaint fails to allege facts which show that the requisite jurisdictional amount is involved, (See cross-petition, No. 823, pp. 24-25,) the plaintiffs were collusively selected to create an appearance of diversity of citizenship which does not in fact exist, (cross-petition, pp. 25-28,) and this suit against former directors was commenced without authority and without the knowledge of the named plaintiffs. (Cross-petition, pp. 28-32.) It nowhere appears that any plaintiff was a creditor of I.U.I. when the alleged wrongful pledgings were made. (Cross-petition, pp. 18-19.) Furthermore, the settlement with and release of the four co-defendant directors against whom exactly the same charges were made as are made against these remaining defendants effected a discharge of all defendant directors from all causes of action alleged. Cross-Petition, pp. 32-35.

Finally, there is a complete absence of necessary allegations to state a cause of action against respondents or any of them on account of the alleged violation of debenture covenants in pledging securities as collateral for bank

loans. Under its charter I.U.I. had a legal right to make investments in securities. It was legitimate for it to borrow money. There is no allegation in the complaint that I.U.I. did not receive full consideration for every loan made and there is no claim that the funds so received were not used properly in the conduct of the business of the corporation. There is no allegation that the debts enumerated in Paragraph 30 of the complaint were the creation of indebtedness in excess of the amount of the capital of the corporation. There are no allegations of fact that the bank loans did not come within the exceptions of the debentures—(a) allowing the Company to pledge its assets for the purpose of securing loans contracted in the usual course of business for periods not exceeding one year, and (b) allowing such pledgings to secure the purchase price of property acquired. Despite the general allegations of fraud and wrongful conduct, this case rests only on the claim that the bank loans were made and the assets of I.U.I. were pledged in breach of the debenture covenants. The complaint does not state this cause of action.

The petition does not show any of the reasons stated in Rule 38(5) which entitle petitioners to a review on a writ of certiorari by this Honorable Court. Wherefore, the petition should be denied.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Respondents.

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No. 822

IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

DE MET'S INCORPORATED,
Plaintiff-Petitioner,

AND

ROBERT E. WOOD,
Intervenor-Petitioner,

VS.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

Answer to Petition for Writ of Certiorari.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

No. 822

DE MET'S INCORPORATED,
Plaintiff-Petitioner,

AND

ROBERT E. WOOD,
Intervenor-Petitioner,

VS.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

Answer to Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

The petitioners have not made an accurate statement of the case.

The complaint in this case against the former directors of Corporation Securities Co. of Chicago (R. 2-15) is even less sufficient in its allegations of fact than the complaint in the *Aiken* case (No. 821 here) against the former directors of Insull Utility Investments, Inc. Following the miscellaneous matter of inducement, the complaint in this

case, as to the cause of action for pledging contrary to the note covenants, alleges merely that the corporation proceeded to borrow money and pledge its property without providing in the instrument creating the pledge that the note-holders should be equally and ratably secured thereby, (Par. 23, R. 10,) that none of the pledges were made to secure the purchase price or any part thereof of the property so pledged, (Par. 25, R. 11,) that the pledges were made at a time when the liabilities exceeded fifty percent of the then value of its assets, (Par. 27, R. 11,) that the corporation was pursuing no course of business which required the borrowing of large sums of money, (Par. 29, R. 11,) that despite the wording of the terms of the notes evidencing said loans none of said loans were made for a period not exceeding one year, (Par. 30, R. 11,) and that each of said loans and pledges was wrongfully authorized, approved and ratified by the defendants. Par. 31, R. 11.

The notes contain the following covenant:

> "The Company does hereby expressly covenant that, as long as any note of this issue of Serial Gold Notes is outstanding and provision for the payment thereof shall not have been made; (a) it will not mortgage, pledge or otherwise incumber any of its assets without securing the notes of this issue equally and ratably, with the other obligations secured or to be secured by such mortgage, pledge or incumbrance; except that the Company, without so securing the notes, may mortgage, pledge or otherwise incumber any of its assets for the purpose of securing loans in the usual course of business, for periods not exceeding one year, and may mortgage, pledge or otherwise incumber property hereafter acquired to secure the purchase price thereof in whole or in part; (b) will neither pay cash dividends on its Common Stock nor redeem or purchase its capital stock of any class in whole, or in part,

when the effect of such payment or redemption or purchase would be to reduce the value of its assets to less than one hundred fifty percentum of its indebtedness then outstanding; and (c) it will not create or assume any additional indebtedness if as a result thereof its total indebtedness will exceed fifty per centum of the then value of its assets, such value to be determined by a certified public accountant or firm of certified public accountants who shall be selected by the Company and be approved by the Registrar." Par. 11, R. 6-7.

The complaint against the defendants as former directors of Corp. was filed January 30, 1933. (R. 2.) Motions to dismiss were filed by the several defendants in 1933, (R. 17-38,) and these were continued generally on the motion of plaintiffs in January, 1934. These motions were sustained as to all alleged causes of action except that based on wrongful borrowing and pledging on March 7, 1940. (R. 317.) There was no necessity to rule on the motion to dismiss as to the excepted cause of action after the motion for summary judgment was allowed as to it. (R. 316.) This motion for summary judgment was filed October 2, 1939, and it asked that a judgment in bar be entered as to the cause of action grounded on the alleged breach of covenants of the Corp. notes for the reason that it had been released as to the former directors of Corp. by a settlement with and release of the lending banks. (R. 56.) The motion was supported by an affidavit respecting the settlement (R. 57) to which was attached the complaint in the suit against the Continental Bank, (R. 58-104,) the petition for decree approving settlement, (R. 105-136,) the order providing for notice and hearing, (R. 137-151,) the answer of the Chicago banks in the consolidated case, (R. 152-155,) the findings of fact and conclusions of law, (R. 156-187,) the decree approving the settlement, (R.

188-190,) the decree in chancery confirming the settlement, (R. 191-204,) the order in bankruptcy confirming the settlement, (R. 205-209,) and the release and transfer of title to the pledged collateral. R. 210-224.

The complaint in *Gregory* v. *Continental Bank,* (R. 58-104,) which is the case in which the settlement proceedings were recorded, includes all the charges against the former directors of Corp. which are made in the complaint at bar and many more. In both suits the complaint purports to be on behalf of all note-holders of Corp. and to be based on the *single* wrong of breaching the note covenants in transactions between the bank and the corporation. Significant among the allegations of the complaint in the settled case are that the bank knew of the actual purpose of the organization of Corp., (Par. 9,) that a subsidiary of the bank was one of the underwriters which marketed the notes containing the covenants, (Par. 16,) that the bank knew that the proceeds of the notes would not meet the corporation's existing commitments, and that the corporation would have to resort to bank loans, (Par. 18,) that contemporaneously with the sale of the notes Corp. was selling a large issue of stock, and that directors of the bank, including two who were also directors of Corp., were subscribers to the stock syndicate, (Par. 19,) that two of the executive officers of the bank were speculating in Insull securities before Corp. was organized and later when the loans were made and the pledges were accepted by the bank, (Par. 20,) that the bank knew that the proceeds of the bank loans were being used by Corp. in stock market support, (Par. 27,) that the bank and some of its officers and directors were personally interested in maintaining the Insull companies with an appearance of solvency, (Par. 21,) that loans were made and assets pledged for the purpose of keeping up an appearance of solvency of Corp. and other companies of the Insull Group because the bank had

outstanding loans aggregating many millions secured only by Insull securities, (Par. 26,) that after the market crash in October, 1929, the banks made huge loans to Corp. to maintain market prices of stock which the banks held as collateral to loans and in which bank officers were speculating, (Par. 37,) and that two of the bank's directors were also directors of Corp. and other Insull companies and knew about the plans and doings of these companies when the bank made the loans to and received assets in pledge from Corp. (Par. 22.) The prayer is that the bank be compelled to cancel all loans and surrender all pledged assets, and for general relief. R. 95.

After Corp. went into bankruptcy a score of suits were filed against the banks by the trustee in bankruptcy and by different groups of note-holders. (R. 106-107, 111, 121-122.) After negotiation it was agreed that all claims of the note-holders and the trustee in bankruptcy be compromised and settled, (R. 126,) and a decree was entered in chancery confirming in the banks title to the collateral pledged to them free from all claims asserted or assertable by the note-holders or by the trustee arising out of or in any manner connected with the pledging (R. 192) and permanently enjoining the note-holders from instituting or prosecuting any suit against the banks on account of such pledging, (R. 194,) and an order was entered in bankruptcy reciting that the settlement had been fully carried out by the payment of $1,200,000 and the performance of other terms of the settlement "in full settlement and compromise of all claims involved" in all of the pending suits, (R. 205,) and it was ordered that the acts of the trustee in bankruptcy in carrying out the settlement be approved and that he deliver releases to all of the banks, (R. 207-208,) and a general release and transfer was executed and delivered to the banks by such trustee. R. 210-215.

Reasons for Denial of the Writ.

1. The decision of the Circuit Court of Appeals with respect to the release of the alleged cause of action against the former directors of Corp. arising out of the alleged pledging of assets by Corp. in violation of note covenants by virtue of the release of the banks for their participation in said pledging follows the decisions of the courts of Illinois. Under the settled law of Illinois the release of the settling banks released the former directors of Corp. as to all causes of action asserted or which might have been asserted by the note-holders for or on account of the alleged wrongful pledging of the assets of Corp. as collateral to the bank loans. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Guth* v. *Vaughan*, 231 Ill. App. 143; *Killham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Gore* v. *Henrotin*, 165 Ill. App. 222, 224; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50.

2. The rule established by the Illinois decisions applies where all alleged wrongdoers contributed to a single injury, even though they acted severally. It would be difficult to conceive of a complaint containing more definite, comprehensive and serious charges of wrongdoing than those stated in the complaint in *Gregory* v. *Continental Bank*, which is the case in which the settlement proceedings were carried out. The mere addition of the names of the former directors of Corp. as parties to that suit would have changed the suit against the Continental Bank *only* to an action charging the bank and these defendants *jointly* for the alleged wrong. All the causes of action asserted or assertable in the complaint in *Gregory* v. *Continental Bank* and similar complaints against another Chicago bank and certain New York banks were fully compromised, satisfied and released by the note-

holders and the trustee in bankruptcy. Under the law established by the Illinois courts and the courts of other American jurisdictions, this unconditional release of the banks released the former directors of Corp. (respondents here), who were charged with acting with the banks in the commission of the alleged wrongs connected with the borrowings and pledgings.

3. The Circuit Court of Appeals does not hold that the banks and the former directors of Corp. were jointly liable as tort feasors and it is the settled law of Illinois that the application of the rule of release of all by the release of some of several alleged joint wrongdoers is not confined to cases where the alleged wrongdoers are jointly liable. The rule applies where all contributed to the same injury even though they acted severally. *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Wagner* v. *C. & A. R. Co.*, 265 Ill. 245, 251; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Muse* v. *DeVito*, 243 Mass. 384, 137 N. E. 730, 731; *First & Merchants National Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465.

4. The statement that the decree approving the settlement with the banks was entered on the express condition that the cause of action against the former directors of Corp. would be preserved is directly contrary to the facts. It is immaterial that the settling note-holders who petitioned for the decree intended to release only the banks. There is no dispute among the authorities that where there is an absolute and unconditional release of one of several alleged wrongdoers it operates to release all who participated in the same act. *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Bee* v. *Cooper*, 217 Cal. 96, 17 Pac. (2nd) 740,

741; *McBride* v. *Scott,* 132 Mich. 176, 93 N. W. 243, 244; *Rust* v. *Schlaitzer,* 175 Wash. 331, 27 Pac. (2nd) 571; *Thompson* v. *Fox,* 326 Pa. 209, 192 Atl. 107, 109; *Ducey* v. *Patterson,* 37 Colo. 216, 86 Pac. 109; *Gholson* v. *Savin,* (Ohio,) 31 N. E. (2nd) 858, 863.

In addition to the grounds assigned by the District Court and the Circuit Court of Appeals in sustaining the motion for summary judgment there are other equally well-supported grounds why a decree for defendants must be entered with respect to the alleged cause of action grounded on the pledging of assets of Corp. as security for bank loans.

5. The complaint fails to allege facts which show that the requisite jurisdictional amount is involved. Plaintiff says it owned notes of the face amount of $20,000 when it filed the complaint. (Par. 10, R. 6.) But it does not allege when it acquired these notes except that it acquired them before maturity, which may have been any time before suit was commenced; nor what it paid for them except that it was something of value; nor that it owned them when the challenged pledging took place; nor that it has been damaged to the amount of $3,000 or in any other amount. The complaint must affirmatively and positively allege facts which show that the jurisdictional amount is present and the allegations cannot be helped by presumptions or argumentative inferences. (*Norton* v. *Larney,* 266 U. S. 511, 515; *Hanford* v. *Davies,* 163 U. S. 273, 280.) This is not a true class action, (*Ayer* v. *Kemper,* 48 Fed. (2nd) 11, 14,) and it must be dismissed as to each plaintiff who does not individually and severally allege affirmatively and distinctly that he has a claim in excess of $3,000. *Ogden* v. *Armstrong,* 168 U. S. 224, 232; *Russell* v. *Stansell,* 105 U. S. 303, 304.

6. There is no allegation that plaintiff was a creditor at the time of the alleged wrongful borrowings and pledg-

ings. For all that appears from the complaint plaintiff may have acquired the notes after the corporation was declared a bankrupt. Courts do not encourage speculation by litigation. Because of the failure of the complaint to show that plaintiff held its notes at the time of the challenged transactions plaintiff has failed to state a cause of action. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629.

7. The complaint alleges no facts to show that the borrowings and pledgings were in violation of the note covenants. All the allegations as to this cause of action are mere conclusions of the pleader. *Van Weel* v. *Winston*, 115 U. S. 228, 237; *Sterling Gas Co.* v. *Higby*, 134 Ill. 557, 568; *Bosworth* v. *Van Lanningham*, 293 Fed. 875, 877.

CONCLUSION.

We shall not extend this answer in opposition to the petition for a writ of certiorari by presenting an argument in support of the reasons relied upon to support the decree of the District Court and the judgment of the Circuit Court of Appeals in ruling in favor of the defendants. The reasons assigned in the memorandum of holdings of the District Court (R. 292-296) and in the opinion of the Circuit Court of Appeals in the *Aiken* case, adopted in this case, (R. 349-352,) are sound and well supported by the decisions of the courts of Illinois and of most other American jurisdictions, as we have demonstrated in our answer in *Aiken et al.* v. *Insull et al.*, No. 821.

The petition does not show any of the reasons stated in Rule 38(5) which entitle petitioner to a review on a

writ of certiorari by this Honorable Court. Wherefore, the petition should be denied.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Respondents.

(12)

Office Supreme Court, U. S.
FILED
JAN 26 1942
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

SAMUEL INSULL, JR., ET AL.,
Cross-Petitioners,

No. 824. *vs.*

DE MET'S, INCORPORATED,
Cross-Respondent.

STANLEY FIELD,
Petitioner,

No. 827. *vs.*

DE MET'S, INCORPORATED,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION AND TO PETITION FOR WRIT OF CERTIORARI.

EDMUND D. ADCOCK,
33 North La Salle Street,
Chicago, Illinois,

ROGER Q. WHITE,
120 South La Salle Street,
Chicago, Illinois,

LEWIS F. JACOBSON,
33 North La Salle Street,
Chicago, Illinois,

GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago, Illinois,

ALBERT W. FROEHDE,
77 West Washington Street,
Chicago, Illinois,
Counsel for Respondents.

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IN THE

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OCTOBER TERM, 1941.

No. 824.

SAMUEL INSULL, JR., ET AL.,
Cross-Petitioners,

vs.

DE MET'S, INCORPORATED,
Cross-Respondent.

No. 827.

STANLEY FIELD,
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vs.

DE MET'S, INCORPORATED,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION AND TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD.

This brief is being filed, to avoid duplication, in opposition to both the cross-petition in No. 824 and the petition for writ of certiorari in No. 827, inasmuch as both of said

petitions are addressed to the same judgment of the Circuit Court of Appeals and raise substantially the same questions, No. 827 being filed by Stanley Field, one of the defendants below, and No. 824 being filed by the other defendants.

The judgment sought to be reviewed by these petitions is that portion of the judgment of the Circuit Court of Appeals (R. 359) which reverses the judgment entered by the District Court, wherein the District Court sustained motions to dismiss the complaint as to the cause of action under Section 23 of the Illinois Corporation Act of 1919 relating to dividends and refused to permit amendments and thereupon dismissed the complaint as to that cause of action for want of equity (Decree, R. 316).

The facts and questions in this case and in the case of *Samuel Insull, Jr., et al.* v. *Thomas D. Aiken, et al.*, No. 823 in this Court, are similar and the two suits are related. They were heard jointly in the District Court and a joint Memoranda of Holdings was filed by that Court (R. 292). Likewise, the Circuit Court of Appeals heard the two matters jointly and by reference incorporated its opinion in the *Aiken* case in its opinion in the *DeMet's* case (R. 346). Some of the petitioners in No. 824 (Stuart and Insull, Jr.) are also petitioners in No. 823.

As stated by the Circuit Court of Appeals, the complaints in both suits, in substance, make the same allegations (R. 344). The differences in the facts in the two suits are primarily in respect to the name of the company involved, the names of the plaintiffs and defendants, dates of various events and amounts. The suit of DeMet's Incorporated (Nos. 824 and 827) is against the directors of Corporation Securities Co. of Chicago, while the suit of Thomas D. Aiken, et al. (No. 823) is against the directors of Insull Utilities Investments Inc.

The petitions for certiorari filed in this case are not so

broad as those filed in the *Aiken* case. The petition in No. 827 is limited to certain of the points raised in Point I of the cross-petition in No. 823 and answered in Point I of our brief in opposition in No. 823, which is hereby adopted to supplement this brief.

The cross-petition in No. 824 is limited to the points raised in Points I and II of the cross-petition in No. 823 and answered in Points I and II of our brief in opposition in No. 823, which is hereby adopted to supplement this brief.

The Supreme Court should not grant certiorari for the reason that the judgment attacked is not final.

The argument on this point is substantially the same as stated in the opening of the opposition brief filed by the respondents in case No. 823, which argument is hereby adopted.

However, we shall proceed to answer the arguments in the briefs filed in No. 824 and No. 827 in the same order in which they were presented in those briefs.

ARGUMENT AS TO INSULL, ET AL. v. DE MET'S, NO. 824.

I.

The Circuit Court of Appeals correctly held that a cause of action was stated under the Illinois statute for declaring or assenting to dividends in impairment of capital or while insolvent and that the plaintiffs should have been given leave to file proffered amendments to the complaint.

This matter is fully argued in Point I of the opposing brief in No. 823, which is hereby adopted. The complaint here alleges that the company had no surplus at any time during the years 1930, 1931 and 1932, and nevertheless the company paid cash dividends during each of these three years on all classes of its preferred stock, the exact amounts of which cash dividends are unknown to plaintiff (R. 12, Par. 33). The complaint also alleges that for a long time prior to April 18, 1932 (date of bankruptcy), the company was wholly insolvent and that on that date its liabilities aggregated over $56,000,000 and its assets about $12,000,000 (R. 7-8). It also alleges that the directors authorized or ratified the payment of dividends as above set forth, thereby rendering themselves liable under the statute to plaintiff and all other creditors (R. 12, Par. 34). For the reasons stated in Point I of the opposing brief in No. 823, these allegations of the original complaint are sufficiently specific to charge all defendants for all dividends paid in impairment of capital or while insolvent. As held by the Circuit Court of Appeals, even though lacking in details it was not fatally deficient (R. 346, 355). The details are stated in full in the proffered amendments (R. 301).

Petitioners point out that the original complaint in this suit said nothing about an Executive Committee and the

connection of the defendants therewith and therefore, they complain that the Circuit Court of Appeals, in its opinion, improperly assumed those facts. Petitioners are mistaken in that respect. The Circuit Court of Appeals was referring to the amendments to the complaint in which the facts concerning the Executive Committee are alleged in detail. Even without any allegations in the original complaint in this cause concerning the Executive Committee, the complaint is no less sufficient, inasmuch as it alleges that the directors "authorized or ratified the payment of dividends as set forth above and thereby rendered themselves liable under the statute" (R. 12, Par. 34). This adequately put defendants on notice that they were being sued for their liability under the statute for declaring or assenting to the dividends. Furthermore, all of the details as to when and how and by whom the dividends were declared or assented to are fully stated in the amendments.

The suit is clearly in behalf of all creditors (R. 2). The prayer is for an accounting and judgment against defendants in favor of the plaintiff and "others similarly situated" (R. 14).

Petitioners' argument that it is nowhere alleged that plaintiff was a creditor at the time the dividends were declared and paid is utterly without foundation. The complaint in the cases at bar alleges that DeMet's Incorporated purchased on or about September 1, 1930, and at the time of filing the suit still owned, $20,000 of the $31,500,000 of Serial Gold Notes issued and sold by Corporation Securities Co. to the public, including plaintiff, at approximately par (R. 6). From the above it clearly appears that plaintiff owned its notes during the entire period when dividends were declared and paid and that it purchased the notes at about par.

The question as to delay in presenting the amendments is the same as in case No. 823. In both cases the delay was acquiesced in by both sides and the intervening period

was devoted to suits against banks and their settlement (R. 39, 307, 338). The District Court passed on the amendments in both cases jointly (R. 292).

All other arguments of the defendants in case No. 824 under their Point I are fully answered in Point I of the opposing brief in No. 823.

II.

The District Court and the Circuit Court of Appeals correctly held that the complaint made a sufficient showing that the requisite jurisdictional amount is involved.

The Record shows that plaintiff acquired its $20,000 of debentures about September 1, 1930 for approximately par and owned them continuously thereafter (R. 6, 243). The complaint contains a formal allegation of jurisdictional amount (R. 3). No question as to jurisdictional amount was ever raised in any of the motions to dismiss the complaint filed by any of the defendants (R. 17-38). It was raised in the Circuit Court of Appeals and in this Court for the first time. The complaint shows that the suit was brought in behalf of $23,233,000 of debenture holders (R. 6), who, in addition to the claim based on wrongful dividends, claimed equal and ratable security in $12,000,000 of collateral pledged to banks for loans of $15,000,000 (R. 8). Those facts alone disclose that more than $3,000 is involved in the suit.

The defendants persist in arguing (p. 19) that the complaint must allege sufficient evidentiary facts in addition to and in support of the general allegation to prove that the matter in controversy exceeds $3,000. That is not the law. The cases cited by defendants either are not in point or they support our position.

In the first case cited by plaintiffs, *Smith* v. *McCullough*, 270 U. S. 456, the court amended the complaint in order

to have it include necessary jurisdictional facts appearing elsewhere in the Record.

In the next case cited by defendants, *Mutual Life Insurance Co.* v. *Thompson,* 27 F. (2d) 753, the court allowed an amendment to clarify the allegation as to jurisdictional amount and said (p. 755):

> "However, federal jurisdiction, in a case of this kind, is not necessarily defeated by even an impossibility of arriving at the exact value, or by difficulty in approximating the value, of the object sought by the bill. If this object has a pecuniary value, and if that value could exceed $3,000, the court cannot, on motion to dismiss, refuse to accept as true an allegation that the value of the object sought exceeds the jurisdictional minimum."

Defendants then cite the case of *Woods* v. *Thompson,* 14 F. (2d) 951 (C. C. A. 7), for the proposition that "it is not enough that a complaint contain a formal allegation of jurisdictional amount" (defendants' brief, p. 19). The court's complete statement indicates under what circumstances the formal allegation is not enough (p. 952):

> "The general allegation that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000, is not controlling. If the particular averments of the complaints disclose the contrary, the general averment is of no avail."

There are no averments in the complaint in the instant case which disclose that less than $3,000 is involved.

In *Norton* v. *Larney,* 266 U. S. 511, another case cited by defendants, no question of jurisdictional amount was involved, but the case is helpful to us because the court itself amended the complaint to include jurisdictional facts appearing elsewhere in the Record. *Hanford* v. *Davies,* 163 U. S. 273, does not involve any question of jurisdictional amount. In *Wolfe* v. *Hartford L. & A. Ins. Co.,* 148 U. S. 389, the plaintiff alleged in his complaint that

he was a "resident" of New York, but no evidence as to his citizenship was introduced at the trial and his citizenship was nowhere disclosed by the record. The court said:

> "It is essential in cases where the jurisdiction depends upon the citizenship of the parties that such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record."

The court in the last case cited above reversed the cause for further proceedings and the above-quoted language makes it clear that if the facts as to jurisdiction are not alleged with sufficient detail in the complaint, such deficiency will be cured if the jurisdictional facts are furnished during the trial or appear elsewhere in the Record.

In *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, the complaint on its face showed that less than the jurisdictional amount was involved and consequently the general allegation that the jurisdictional amount was involved was contradicted. This is made clear by the following statements by the court (pp. 85-6):

> "The facts specifically stated show that the amount in controversy was less than $3,000. Plaintiff's claim against the company was $2,100. * * * Since the bill in this case discloses that the amount in controversy was less than the jurisdictional amount, the general allegation that it exceeds this amount is, therefore, of no avail."

In *Pianta* v. *Reich Co.*, 77 F. (2d) 888, the complaint again showed on its face that the plaintiff's claim was for less than the jurisdictional amount. The court said (p. 890):

> "We turn now to the appellant's attack upon the jurisdiction of the District Court. The complaint in the receivership action showed on its face that the plaintiff's claim was for only $600."

The defendants reargue (p. 20) their theory that the debenture holders are entitled to no relief unless they owned their debentures on the dates when the dividends were improperly declared and paid. This is a matter of defense which would have no relation to the question of whether or not the complaint contains sufficient allegations to show that the jurisdictional amount of $3,000 is involved. However, in the case of *Woolverton* v. *Taylor*, 132 Ill. 197, the Court held that the directors were liable under the statute to all of the creditors of the corporation regardless of when they acquired their claims and said (p. 212):

> "The officers, if liable at all, are liable to all the creditors of the corporation,—those existing prior to the contract creating the excessive indebtedness, those whose debts are created thereby, and also those who may afterwards become its creditors."

The law is clear that so long as the complaint alleges in good faith that more than $3,000 is involved, it need not allege the evidence to prove the nature and extent of the damages. It is only when the allegations in the complaint make it clear to a legal certainty that the claim is actually for less than the jurisdictional amount that the general allegation of jurisdictional amount will be disregarded. The defendants can point to no allegations in the complaint making it clear to a legal certainty that the plaintiffs in this suit cannot recover more than $3,000. The rule has been recently repeated in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283 (pp. 288-9):

> "The rule governing dismissal for want of jurisdiction in cases brought in the Federal Court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

In *General Pet. Corp.* v. *Beanblossom,* 47 Fed. (2d) 826 (C. C. A. 9), the plaintiff sued to enjoin the breach of a lease and the court said (p. 828):

> "The jurisdictional averments in this case were a diversity of citizenship, and that the value of the leasehold and leasehold rights, and the matter in controversy, exceeds, exclusive of interest and costs, the sum or value of $3,000. This general averment was, in our opinion, sufficient as against a motion to dismiss."

In *Kline* v. *Wright,* 42 Fed. (2d) 927 (D. C. D. Idaho), the court said (p. 928):

> "The test is that the record must create a legal certainty of want of jurisdictional amount before the court would be warranted in holding that it did not have jurisdiction."

Hence, the positive allegation in the complaint that "the matter in dispute herein, exclusive of interest and costs, exceeds the sum of $3,000" must control as a sufficient allegation to base jurisdiction (R. 3).

In addition, the amendments to the complaint, which the Circuit Court of Appeals has ordered should be filed, certainly contain sufficient allegations in respect to the amount of dividends, and the time of their declaration and payment, to satisfy anyone (R. 301-306). Reference is hereby made to our answer filed to the defendants' cross-petition for writ of certiorari in Case No. 823 in which the authorities are cited for the proposition that insufficient allegations in the complaint may be cured by amendment.

The conclusion is inescapable that the District Court and the Circuit Court of Appeals were correct in refusing to dismiss this suit for the alleged lack of sufficient allegations in respect to jurisdictional amount.

ARGUMENT AS TO FIELD v. DE MET'S, NO. 827.

Petitioner Field attempts to argue that he stands on an entirely different basis from any other party. It appears, however, that not only was he one of the directors of Corporation Securities Co. from June, 1930 until the bankruptcy of the company (R. 5-6) but also that he was a director of other Insull companies and fully acquainted with the affairs of all the Insull companies (R. 74, Par. 22). In the proffered amendments (R. 301-306) the participation of Stanley Field in declaring or assenting to the dividends here involved, is stated in detail. While he was not a member of the Executive Committee, he was one of the directors who participated in the appointment of members of that Committee and authorized them to declare dividends (R. 305), and thereby the Executive Committee became his agent. Furthermore, he was among those who ratified, confirmed and approved dividends declared by the Executive Committee (R. 301-305).

The decision in *Howard* v. *Insull,* 294 Ill. App. 20, has no bearing whatever on the liability of petitioner Stanley Field, under Section 23 of the Illinois Corporation Act, as that question was not involved in the Illinois Appellate Court case. Therefore, the essential integrity of the conduct of Stanley Field deducible from that decision by reason of the failure of the complaint in that case to charge Field with fraud, is totally irrelevant to the case at bar.

It therefore appears that Stanley Field stands in no different position than any other defendant in respect to his liability under Section 23 of the Illinois Corporation Act of 1919.

A.

The complaint adequately alleges knowledge by all defendants of the financial condition of Corporation Securities Company.

The argument of petitioner, Stanley Field, is fully answered in sub-division D of Point I of the opposing brief in case No. 823, which is hereby adopted.

The case of *White-Wilson-Drew Co.* v. *Lyon-Radcliff Co.*, 268 Fed. 525, is inapplicable here because in that case the complaint on its face showed that the directors had no knowledge of the wrongful acts; whereas the contrary appears in the complaint here (R. 13). It should also be noted that in the 1872 statute involved in that case "assenting" was a prerequisite to liability, whereas the 1919 statute imposes liability for "declaring or assenting."

B.

The allegation that dividends were declared in the first instance by the Executive Committee and thereafter ratified by the Board of Directors does not relieve the defendants from liability therefor.

The argument of petitioner Field on this point is fully answered in sub-division B of Point I of the opposing brief in case No. 823, which is hereby adopted.

Conclusion.

The defendants' cross-petition and the petition by the defendant, Field, fail to furnish any reason for the review by this Court of that portion of the judgment of the Circuit Court of Appeals which is in favor of the plaintiffs. The portion of the judgment under attack is not final and this

Court should not burden itself with the review of preliminary matters which may become moot before the case is ended, as is pointed out in the introductory argument in the brief of cross-respondents in case No. 823. Moreover, the judgment is not in conflict with the applicable decisions of the State and Federal Courts.

For all of these reasons respondents urge that the cross-petition and the petition for certiorari in these two cases be denied.

Respectfully submitted,

EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
ROGER Q. WHITE,
GEORGE F. CALLAGHAN,
ALBERT W. FROEHDE,
Counsel for Respondents.

(13)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 822

DE MET'S INCORPORATED,
Plaintiff-Petitioner,

AND

ROBERT E. WOOD,
Intervener-Petitioner,

vs.

SAMUEL INSULL, JR., C. W. SILLS, H. L. STUART, STANLEY FIELD, EDWARD J. DOYLE, F. K. SHRADER AND JOHN H. GULICK,
Defendants-Respondents.

BRIEF OF RESPONDENT, STANLEY FIELD, IN OPPOSITION TO PETITION FOR CERTIORARI.

Kenneth F. Burgess
DONALD F. MCPHERSON,
GEORGE RAGLAND, JR.,
11 South La Salle St.,
Chicago, Illinois,
Attorneys for Respondent, Stanley Field.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Defendants-Respondents.

BRIEF OF RESPONDENT, STANLEY FIELD, IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT OF THE CASE IN RESPECT TO THIS RESPONDENT.

In the District Court of the United States for the Northern District of Illinois, through the efforts of counsel for plaintiffs, two cases were heard together on motions of defendants to dismiss for insufficiency of the complaints.

Those cases were the instant case and the case of *Aiken, et al.* v. *Samuel Insull, Jr., et al.* Both cases were dismissed. The plaintiffs appealed and again in the United

States Court of Appeals for the Seventh Circuit the cases were argued together. There was affirmance in part and reversal in part.

The two cases involved wholly distinct corporations, different transactions, and different directors. The instant case deals with a corporation styled "Corporation Securities Co. of Chicago." The *Aiken* case deals with a corporation styled "Insull Utility Investments, Inc."

This respondent, Stanley Field, is not a party to the *Aiken* case. He at no time had any connection with the corporation implicated in the *Aiken* case, whether as officer, director or stockholder. He is a stranger to that case and to the affairs of the company there complained of. The two corporations had nothing in common save that each was under Insull management.

The complaint in the *Aiken* case is insufficient but that in the instant case lacks every element that a pleading must include, whether the criterion be that the document should state a cause of action, or the looser test of simply requiring the pleading to inform the defendants of the nature of the complaint.

Under these circumstances the plaintiff-petitioner of course seeks to sustain, not the valueless complaint in the instant case, but the more complete pleading in the *Aiken* case to which Field is not and never has been a party. In opposing this petition for certiorari he is forced to answer the statement of facts and arguments presented for the allowance of the writ made in the *Aiken* case.[1]

This position, we believe, is unfair and prejudicial to the respondent Field.

---

[1] The Petition for Certiorari in the instant case incorporates by reference the statement of facts, questions and reasons presented for the allowance of the writ, and supporting brief in the "Petition for Writ of Certiorari and Brief in Support Thereof" filed in *Aiken, et al.* v. *Samuel Insull, Jr., et al.*, and docketed as No. 821. (pp. 5, 6 of instant Petition)

The very limited statement of facts in the instant Petition in addition to the facts incorporated by reference from the Petition in that other case is incorrect and incomplete.

The instant Petition states that "Corporation Securities Company of Chicago was organized by Samuel Insull and the other defendants herein about October 5, 1929, as an investment company. (R. 3)" (p. 2) Such a statement is not true as to this respondent, Stanley Field. Not only did the complaint not so allege but it was admitted in the amendment to the complaint which the plaintiff-petitioner asked leave to file that Field was not elected to the board of directors of Corporation Securities Co. of Chicago until June 11, 1930. (R. 305) Prior to that date this respondent had had no connection with the corporation. At no time, either before, on, or after June 11, 1930, was Field an officer or member of the executive committee of Corporation Securities Co. of Chicago, nor did he have any personal transactions with the corporation. (R. 305)

In January, 1933, following the bankruptcy of Corporation Securities Co. of Chicago in April, 1932, the plaintiff-petitioner, De Met's Incorporated, brought an action to recover damages from all the directors of that company (including this respondent), for allegedly inducing the company to breach the covenants contained in its Serial Gold Notes by making pledges of collateral security for loans obtained from certain Chicago and New York banks in the fall of 1930 and the spring of 1931, without ratably securing the holders of the Serial Gold Notes. (R. 2) Diversity of citizenship was averred as the sole ground for federal jurisdiction, the plaintiff alleging that it was a Delaware corporation owning $20,000 principal amount of Serial Gold Bonds. (R. 3, 6) The basis of the charge against the directors of Corporation Securities Co. of Chicago is the allegation that "Each of said loans and pledges above referred to was wrongfully authorized, approved and ratified

by the defendants herein". (R. 11)[1] More than four years later the petitioner-intervener, Robert E. Wood, intervened as a member of a so-called "Committee" on behalf of certain holders of Serial Gold Bonds. (R. 47)

Subsequent to the filing of this action against the directors of Corporation Securities Co. of Chicago, suits were brought against certain Chicago and New York banks on behalf of the same noteholders who had sued the directors, seeking to recover damages from the banks for receiving the pledge of the same securities which the earlier suit had charged that the directors of the borrowing company, Corporation Securities Co. of Chicago, wrongfully authorized, approved and ratified.

Late in 1937 the actions against the banks were settled "in full" (R. 126), and "full releases" (R. 129) and "full title" to the collateral securities alleged to have been wrongfully pledged (R. 128) were given the banks. The settlement was presented for approval to the District Court for the Northern District of Illinois by petition of the complainant noteholders in the consolidated bank litigation, and was approved and confirmed by the court.

The first Paragraph, numbered A, of the settlement agreement provided that the banks should pay $1,200,000 in cash "in full settlement of all claims." (R. 126) In addition, the banks agreed to procure the withdrawal of claims aggregating $13,662,377.96 theretofore filed against the

[1] The complaint also alleged liability on the part of all the defendant directors in respect of the payment of dividends in the early thirties in alleged contravention of Section 23 of the 1919 Illinois Corporation Act. As to this charge, the District Court sustained the defendants' motions to dismiss for failure of the complaint to state any actionable facts. The Circuit Court of Appeals for the Seventh Circuit, however, reversed this holding and remanded the cause for trial in the District Court. This respondent, Stanley Field, has filed a petition for certiorari from that judgment of the Circuit Court of Appeals in the cause entitled, "Stanley Field, Petitioner *vs.* DeMet's Incorporated, Respondent", which was docketed herein as No. 827.

bankruptcy estate of Corporation Securities Co. of Chicago. (R. 128) The banks further agreed to cancel the $3,999,000 principal amount of Serial Gold Notes owned and controlled by them so that these notes would not be entitled to receive any portion of the settlement fund nor be entitled to any distribution in the bankruptcy proceedings of Corporation Securities Co. of Chicago. (R. 129) In return for this "full settlement" the banks received (1) "delivery of full releases" and (2) "full title" to the securities which in that litigation and in the instant suit were alleged to have been wrongfully pledged with the banks. (R. 128-9)

An endorsement of release and transfer was stamped on each of the Serial Gold Notes of Corporation Securities Co. of Chicago prior to distribution of the settlement funds, and provided, among other things, that:

> "By the acceptance of said compromise and settlement the holder hereof, among other things, releases all claims against the banks * * * and assigns to said respective banks all claims of such holder to the collateral pledged to said respective banks by Corporation Securities Co. of Chicago as security for the loans to Corporation Securities Co. of Chicago by said respective banks." (R. 194-195)

The release and transfers executed by the Trustee in Bankruptcy of Corporation Securities Co. of Chicago provided, among other things, that "for and in consideration of the consummation of the aforesaid settlement," the Trustee in Bankruptcy of Corporation Securities Co. of Chicago "has remised, released and forever discharged" the banks "from all and all manner * * * claims and demands whatsoever, in law or in equity," and does "quitclaim, assign, transfer and set over unto" the banks all right and title to the securities alleged to have been wrongfully pledged as collateral. (R. 212-215)

On the basis of this "full settlement" with the banks and "full releases" of the banks and giving of "full title" to

the banks in the collateral securities alleged to have been wrongfully pledged, this respondent filed a motion for summary judgment, as did the other defendant-directors of Corporation Securities Co. of Chicago. The District Court sustained those motions and entered judgment in favor of the defendant-directors, and the Circuit Court of Appeals for the Seventh Circuit affirmed the judgment. Both courts stated in so holding that they were following the decisions of the Illinois State courts, which all parties have recognized to be applicable and controlling.

The District Court stated in part:

> "The original placing of this property in the hands of the banks was the wrong complained of, and is the same wrong now complained of against the defendants. To permit plaintiffs to settle with the banks and confirm title in them to the disputed assets and yet reserve a right to further pursue defendants for the same wrong, to me seems completely unjust and inequitable.
>
> "There could be no difference of opinion regarding the effect of the settlement as disclosed by plaintiffs in their petition to the Court except for the single paragraph K of their petition and like expressions carried into the consent orders of the Court. Aside from Paragraph K, I think all would agree that a full settlement and release had been given the banks. This paragraph with the inescapable implications it carries would read: 'Nothing in this agreement of settlement and compromise * * * shall be construed to operate as a release or to affect any causes of action * * * against any person * * * other than any party to this settlement * * *; but is to be construed as a release and settlement of the cause of action against the parties hereto.' (Underscored words interpolated by writer.)
>
> "There is not a single expression in the entire petition that even hints that plaintiffs were only contracting with the banks to refrain from their further prosecution. By throwing in Paragraph K, it is hoped to have the settlement construed as something it was not.

The settlement could without doubt be set up by the banks in bar of another suit. If so, this is conclusive.

"It is said that in view of Paragraph K, it would be a fraud on the debenture holders to now hold that they had released their asserted cause of action against defendants. I think not. They were the moving parties and are in no position to complain of a situation that they have brought about by the insertion of a meaningless and repugnant attempted reservation. If they had in fact released the banks they were bound to know that and were bound to know the legal effect of such release. I cannot construe the settlement with the banks to be something it was not.

"My judgment is that plaintiffs have no cause of action in so far as it is bottomed upon the alleged wrongful pledging of assets to the banks for the reason that there has been a full release of such cause of action and for the further reasons indicated. The motions for summary judgment to this extent will be allowed.

"My conclusions are in accord with what I deem the law of Illinois to be. While some Illinois cases use language not completely approved in others, their consistent holdings have been that a release of one joint tort feasor releases all. It is scarcely fair to say that *Parmelee* v. *Lawrence,* 44 Ill. 405, overrules the two earlier Illinois cases, yet it does adopt a more liberal attitude than the two earlier cases. In Parmelee *vs.* Lawrence, however, I think it plain that the parties were only intending a covenant not to sue the settling party and the language used was fairly expressive of such intention; moreover, to have placed a different construction on it would have clearly been a fraud upon Lawrence." (R. 295-296)

The Circuit Court of Appeals for the Seventh Circuit, in confirming the judgment of the District Court in favor of the defendants, stated in part:

"In our case the settlement agreement, read in its background of approval orders and confirmation decrees, discloses very definitely that the parties intended to settle and compromise the cause of action sued on, in so far as the banks were concerned. The

debenture holders and the trustee in bankruptcy not only released their claims for damages against the banks, but they waived whatever interest they had in the collateral and confirmed title thereto in the banks. In return the banks cancelled the bank indebtedness of I.U.I., waived their claims against the estate of the bankrupt corporation, and paid almost $3,500,000 in cash. There can be no real controversy as to whether the settlement and compromise agreement was a release to the banks or merely a covenant not to sue the banks. We are satisfied that in substance (actual intent) as well as in form (language employed), the instrument constituted a release." (R. 351-2, the *Aiken* opinion as adopted in the *De Met's* opinion, R. 344, 346)

SUMMARY OF ARGUMENT.

The decision below is in accord with the controlling decisions of the Supreme Court of Illinois and the Appellate Court of Illinois: Accord and satisfaction with, or release of, one or more tortfeasors releases all whose acts contributed to cause the same injury.

ARGUMENT.

THE DECISION BELOW IS IN ACCORD WITH THE CONTROLLING DECISIONS OF THE SUPREME COURT OF ILLINOIS AND THE APPELLATE COURT OF ILLINOIS: ACCORD AND SATISFACTION WITH, OR RELEASE OF, ONE OR MORE TORTFEASORS RELEASES ALL WHOSE ACTS CONTRIBUTED TO CAUSE THE SAME INJURY.

This Petition for Certiorari involves the single question whether under the common law of Illinois, as declared and applied by the Supreme Court of Illinois and the Appellate Court of Illinois, accord and satisfaction with, or release of, one or more tortfeasors releases all whose acts contributed to cause the same injury. If this is the law of Illinois, all federal courts, of course, must apply that law under the decision of this Court in *Erie Railroad* v. *Tompkins*, 304 U. S. 64 (1938), and numerous subsequent decisions. Both courts below, the District Court and the Circuit Court of Appeals, held that the law of Illinois was that accord and satisfaction with, or release of, one or more tortfeasors releases all whose acts contributed to cause the same injury.

The "conflict with applicable local decisions" which the petitioners urge as the basis of allowance of certiorari is defined by them as "absence of a decision by the state courts on the question of local law as to the effect of a reservation clause in a release of joint tortfeasors • • •." (pp. 8, 10 of *Aiken* Petition which is incorporated by reference on p. 5 of instant Petition.) The petitioners contend that "If this point were presented to the Illinois courts, they would unquestionably hold • • •" the way the petitioners argue they should hold. (p. 30 of *Aiken* Brief which is incorporated by reference on p. 6 of instant Petition.)

Such a contention, even if it could be supported, would not constitute a sufficient reason for certiorari. The holdings of the Illinois State courts make it clear, however, that the petitioners' contention cannot be supported.

The Illinois State Court Decisions.

The Illinois State courts have always and without exception held that accord and satisfaction with, or release of, one or more tortfeasors releases all whose acts contributed to cause the same injury. In the earliest reported Illinois decision on the subject, *Chapin* v. *C. & E. I. R. R. Co.*, 18 Ill. App. 47, 50 (1885), the Appellate Court for the Third District of Illinois declared this rule of law and quoted with approval from an earlier Massachusetts decision as follows:

> "It is an ancient doctrine that a release to one joint tort trespasser, or a satisfaction from him, discharges the whole. The same doctrine applies to all joint torts, and to torts for which the injured party has an election to sue one or more parties severally."

No Illinois State court has departed from or limited that rule of law in any respect. A chronological list of the principal decisions of the Illinois State courts follows:

Chapin v. *C. & E. I. R. R. Co.*, 18 Ill. App. 47, 50 (1885).

Vigeant v. *Scully*, 35 Ill. App. 44, 47 (1889).

City of Chicago v. *Babcock*, 143 Ill. 358, 366, 32 N. E. 271, 273 (1892).

West Chicago St. R. R. Co. v. *Piper*, 165 Ill. 325, 328, 46 N. E. 186, 187 (1897).

Stanley v. *Leahy*, 87 Ill. App. 465, 467 (1899).

Mooney v. *City of Chicago*, 239 Ill. 414, 423, 88 N. E. 194, 196 (1909).

Wallner v. *Chicago Traction Co.*, 245 Ill. 148, 151, 91 N. E. 1053, 1054.

Gore v. *Henrotin*, 165 Ill. App. 222, 224 (1911).

Petroyeanis v. *Pirola,* 205 Ill. App. 310, 312 (1917).

Gilbert v. *St. Louis, Springfield & Peoria Railroad,* 220 Ill. App. 51, 53 (1920).

Guth v. *Vaughan,* 231 Ill. App. 143, 151 (1923).

Onyschuk v. *A. Vincent Sons Co.,* 277 Ill. App. 414, 427 (1934).

The petitioners refer to some of the cases cited above and undertake to distinguish them, contending that "An Illinois case is not determinative of this case unless its facts are similar to the facts in the instant case." (pp. 29-30 of *Aiken* Brief which is incorporated by reference on p. 6 of instant Petition.) They do not contend, however, that the Illinois decisions evidence any modification of the rule of law declared and applied in the cases listed above and summarized by the Supreme Court of Illinois in *Wallner* v. *Chicago Traction Co.,* 245 Ill. 148, 151 (1910) as follows:

> "There is no doubt that a release of one of several joint tortfeasors releases all and that an accord and satisfaction by one joint tortfeasor has the same effect as to all. It is equally certain that payment and acceptance of a sum of money in satisfaction of an unliquidated demand is a good accord and satisfaction." (Omitting citations.)

The petitioners state that "The leading case in Illinois on the subject is that of *Parmelee* v. *Lawrence,* 44 Ill. 405, decided in 1867." (p. 21 of *Aiken* Brief, which is incorporated by reference on p. 6 of instant Petition.) In that case which, as the Circuit Court of Appeals pointed out, involved joint debtors and not joint tortfeasors, the Supreme Court of Illinois stated a rule of law which is equally controlling here, as follows on page 409:

> "The difficult question in this case relates to the effect to be given to the instrument executed by Lawrence to Bigelow. If it is to be regarded as an abso-

> lute and unconditional release of Bigelow, it must also operate as a discharge of his co-obligors * * *."

Both the District Court and the Circuit Court of Appeals held, as the settlement documents in terms provide, that the banks were absolutely and unconditionally released. (See pp. 6 to 8 of this brief.)

The charge against the directors of Corporation Securities Co. of Chicago, including this respondent, at the most is that they induced the corporation of which they were directors to pledge certain collateral securities to the banks in alleged violation of the covenants of the corporation's notes. The charge against the banks was that they received the pledge of this collateral. In the instant case the suits against the banks had not been tried when the settlement was effected.[1] The holding of both the District Court (R. 296) and the Circuit Court of Appeals (R. 350) was that the action of both the directors and the banks was necessary to the consummation of the wrong complained of. "According to Illinois law, 'It is enough if they were both liable for the same injury'," as the Circuit Court of Appeals stated, citing and quoting from *Chapin* v. *C. & E. I.*, 18 Ill. App. 47, 50 (1885). (R. 350)

In the *Chapin* case, to which the Court thus refers, a passenger was injured in a collision between two railroad trains. A release which he executed to one railroad company was pleaded as a defense by the other and was upheld, the court stating at page 50:

> "It is conceded that the action in this case is brought to recover for the same injury for which settlement has been made with the Wabash company, but it is insisted that the two companies were not joint tort feasors, were therefore not jointly liable, and that the

[1] Therefore, Section II of the *Aiken* Brief has no application to the facts of the instant case. (See statement on p. 5 of instant Petition: "Question No. 7 and Reason No. 6" presented in the *Aiken* case do not apply in the instant case because the facts on which they are based do not exist here.)

> release of one does not have the effect of discharging the other from liability to the plaintiff. Whether they were joint tort feasors or not, we do not deem it important in the view we take of the case, to decide. It is enough if they were both liable for the same injury."

The Supreme Court of Illinois declared and applied the same rule of law in *Mooney* v. *City of Chicago,* 239 Ill. 414 (1909).[1] In that case a man was injured while driving a team and wagon on a city street. The accident was due to two factors: the negligence of the man's employer in failing to keep the wagon in proper repair and the negligence of the city in failing to adequately maintain the street. The man made a settlement with his employer and furnished him with a release. Later he died and his next of kin brought an action against the city under the death statute based on the same injury. The trial court and the appellate court had held that the cause of action released before the man's death was an entirely different cause of action and did not furnish a defense to the city. The Supreme Court reversed this ruling and held that there was only one injury and that the release to the employer was a bar to the action against the city.

The decisions of the Illinois State courts, therefore, fully support the judgment of both the District Court and the Circuit Court of Appeals in this case that, under the common law of Illinois, accord and satisfaction with, or release of, one or more tortfeasors releases all whose acts contributed to cause the same injury.

---

[1] *People* v. *Becker*, 253 Ill. 131 (1911), which the petitioners cite, is entirely consistent, since the injuries caused by the wrongful acts there involved were separate and distinct. Of course, a judgment on warrants drawn by the State Auditor in favor of himself did not affect a subsequent suit involving different warrants drawn by the Auditor in favor of the State Treasurer, as the court there held.

Conclusion.

We urge that the Petition of DeMet's Incorporated, *et al.* for a Writ of Certiorari be denied.

Respectfully submitted,

DONALD F. MCPHERSON,
GEORGE RAGLAND, JR.,
11 South La Salle St.,
Chicago, Illinois,
Attorneys for Respondent,
Stanley Field.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

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IN THE

Supreme Court of the United States

AT THE OCTOBER TERM, 1941.

315 U.S. 806

No. 823

SAMUEL INSULL, JR., ET AL.,
Cross-Petitioners (Defendants),

vs.

THOMAS D. AIKEN, ET AL.,
Cross-Respondents (Plaintiffs),

BRIEF OF CROSS-RESPONDENTS (PLAINTIFFS) IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI.

EDMUND D. ADCOCK,
33 North La Salle Street,
Chicago, Illinois,

ROGER Q. WHITE,
120 South La Salle Street,
Chicago, Illinois,

LEWIS F. JACOBSON,
33 North La Salle Street,
Chicago, Illinois,
Counsel for Cross-Respondents (Plaintiffs).

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

AT THE OCTOBER TERM, 1941.

No. 823.

SAMUEL INSULL, JR., ET AL.,
Cross-Petitioners (Defendants),

vs.

THOMAS D. AIKEN, ET AL.,
Cross-Respondents (Plaintiffs),

BRIEF OF CROSS-RESPONDENTS (PLAINTIFFS) IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Supreme Court should not entertain the defendants' cross-petition for writ of certiorari for the reason that the judgment which the cross-petitioners attack is not final.

The "cross-petition" by the defendants prays that the judgment of the Circuit Court of Appeals "may be reviewed in so far as the Circuit Court of Appeals reversed

the decree of the District Court for the Northern District of Illinois'' (defendants' cross-petition, p. 1). The District Court sustained certain motions of the defendants to dismiss the complaint as to the cause of action for improper payment of dividends for failure to state a cause of action (R. 269-297, 321) and denied the plaintiffs' motion for leave to file amendments to the complaint (R. 321). The Circuit Court of Appeals reversed that portion of the District Court's judgment and held that the original complaint stated a cause of action and that the plaintiffs should have been given leave to file their proffered amendments to the complaint (R. 358-363).

Other defenses asserted by defendants were unsuccessful. In the District Court defendants had also contended, as other grounds for dismissal, that the jurisdictional amount was not adequately alleged and that non-resident plaintiffs had been selected collusively to establish Federal jurisdiction. The District Court held against these contentions and found that it had jurisdiction of the parties and of the subject matter (R. 297). Upon defendants' motion to require plaintiffs' attorneys to show their authority to maintain this suit, the District Court heard evidence and decreed that such authority was established (R. 321). The District Court's decree also denied defendants' second motion for summary judgment by which they sought to bar this suit on the ground that covenants not to sue had been given by plaintiffs to four of the defendants (R. 321). Defendants took no appeal from any of these rulings, but on plaintiffs' appeal from the final decree defendants urged all of the defenses in which they had been unsuccessful as additional argument to sustain the decree of dismissal. In the Circuit Court of Appeals plaintiffs raised objection to the right of defendants to urge arguments as to authority to sue and covenants not to sue without having taken any cross-appeal. The effect of their failure to appeal is discussed in Point IV of this brief. However, the

Circuit Court of Appeals considered these arguments of the defendants and found them to be unsound (R. 352-363). The judgment order of the Circuit Court of Appeals, which the cross-petition seeks to review, is:

> "* * * the judgment of the said District Court in this cause appealed from be, and the same is hereby affirmed as to the cause of action relating to the pledges, and reversed as to the cause of action relating to the dividends; and that this cause be, and it is hereby, remanded to the said District Court with directions to proceed in accordance with the opinion of this Court filed in this cause." (R. 364.)

Obviously, the order of the Circuit Court of Appeals, in reversing that portion of the District Court's judgment relating to the improper payment of dividends, is not a final decree but is simply an intermediate or interlocutory order. It is an order which settles the sufficiency of the original complaint and grants leave to the plaintiffs to file amendments to the complaint. When this case goes back to the District Court, the amendments to the complaint will be filed and the only burden placed on the defendants will be to plead to the amended complaint. When the pleadings are closed and the trial takes place, the final decree may be entered on the merits in behalf of the plaintiffs. If that should happen, the defendants would still have the right, should the Circuit Court of Appeals affirm the District Court, to petition this Court for review by certiorari of the same questions, relating to the sufficiency of the complaint, the amendments and jurisdiction of the court, which they now seek to have this Court review prematurely. If, on the other hand, the final decree after trial should be in favor of the defendants, all the matters now raised by defendants' cross-petition for writ of certiorari would become moot.

The principle has been enunciated in many cases that the Supreme Court should not grant certiorari except

from final decrees. In *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, this Court stated the rule as follows (p. 258):

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." (citing cases)
>
> * * * * *
>
> "And, except in extraordinary cases, the writ is not issued until final decree." (citing cases)
>
> * * * * *
>
> "The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; * * *"

Of course, it may be true that this Court is not expressly prohibited by any statutory restrictions from considering petitions for certiorari addressed to interlocutory orders but the extent to which it should limit its jurisdiction is set forth in *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, in which Justice Gray said (p. 384):

> "Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

There is no showing made in the defendants' cross-petition for certiorari, nor could such a showing be made, that their petition should be granted in order to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." On the contrary, the defendants' cross-petition indicates no more than that the defendants desire to have this Court pass upon preliminary questions of pleadings.

This Court should not be burdened, by virtue of the

piecemeal review of a case, with the consideration of issues which may become moot by the time when the final decree shall be entered. For that reason alone the defendants' cross-petition should be denied, in which event the points raised in their cross-petition, together with our refutation of those points presented in the balance of this answer, become unimportant. However, we shall now answer the points argued in the cross-petition in the same order in which they are discussed in the cross-petition.

I.

The Circuit Court of Appeals correctly held that a cause of action was stated under the Illinois statute for declaring or assenting to dividends in impairment of capital or while insolvent and that the plaintiffs should have been given leave to file the proffered amendments to the complaint.

The defendants' cross-petition for certiorari involves only the cause of action under Section 23 of the Illinois Corporation Act of 1919, which provides:

> "The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases: * * *
>
> (2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend; * * *"

The District Court sustained defendants' motions to dismiss as to this cause of action on the ground that the original complaint was lacking in details as to the dividends involved and was not sufficiently specific to charge any individual director with being present at any meeting when dividends were declared or assented to (R. 296-297). Thereupon, plaintiffs promptly submitted amendments (R. 299, 317) which set forth details as to each dividend and

the participation of each defendant therein, but the District Court denied leave to amend (R. 312-315, 319).

The Circuit Court of Appeals agreed with the District Court that the original complaint tends to be deficient in details, but was satisfied that it is not fatally deficient in any essential (R. 357-360). It further held that the District Court erred in refusing leave to the plaintiffs to file the amendments on the ground of delay in presenting them inasmuch as the record conclusively shows that the delay in disposing of the motions to dismiss was agreed to and acquiesced in by both sides and that the intervening period was devoted in the main to the settlement of the bank cases referred to in *Aiken* v. *Insull*, case No. 821 before this Court (R. 360). The Circuit Court of Appeals further held that the Statute of Limitations was no bar to the filing of the amendments because they merely stated the subject matter of the original complaint more fully and not as a new cause of action (R. 360).

Defendants made other contentions which the Circuit Court of Appeals considered and in respect to which it held against the defendants (R. 360-362). These contentions of the defendants, as well as their argument that the deficiency of details in original complaint was fatally defective and that the amendments should not have been permitted, are reiterated in Point I of cross-petitioners' brief and will be discussed by us in the following subdivisions of this Point I.

A. *The original complaint was sufficiently specific to charge all defendants for all dividends.*

In approaching this point, it must be borne in mind that amendments were tendered which amplified in detail the allegations which the District Court considered insufficient. Defendants' contention that the original complaint was not

sufficiently specific is relevant only to the question whether the original complaint was so deficient in failing to state any cause of action as to be fatally defective so that there was nothing to which the amendments could attach, thus giving rise to the question whether the amendments stated a new cause of action barred by the Statute of Limitations. If, on the other hand, the original complaint did state a cause of action, even though defectively, then, under the Rules of Civil Procedure, however deficient it may have been in details, it would be clearly erroneous to dismiss the suit for want of equity when plaintiffs have offered amendments as to that same cause of action which cure the defects and supply the details.

The allegations of the original complaint pertinent here are, in substance, as follows:

(a) About January 1, 1930, the plaintiffs and approximately 20,000 members of the public purchased, at approximately par, the $60,000,000 of 10-year 6% Series B debentures, issued by I. U. I. at that time, of which approximately $55,000,000 remained unpaid and outstanding in the hands of plaintiffs and the other members of the public at the time of filing suit (R. 11-12); and the holdings of each plaintiff are specified (R. 19). At the time of filing suit there were also outstanding in the hands of the public $2,469,000 of 20-year 5% Series A debentures issued by I. U. I. about January 1, 1929 (R. 6);

(b) All defendants in this suit constituted and served as the directors of I. U. I. continuously from January 14, 1929 until its bankruptcy, April 16, 1932 (R. 5);

(c) Certain of the defendant-directors, including the cross-petitioners, Insull, Jr., Doyle and Stuart, constituted and served as the Executive Committee and Finance Committee during the entire period (R. 5);

(d) During the entire existence of I. U. I. Section 23 of the Illinois Corporation Act of 1919, above referred to, was in effect (R. 33);

(e) On December 13, 1931, the total liabilities of I. U. I. exceeded the total fair market value of assets and ever since

that date I. U. I. has been wholly and irretrievably insolvent (R. 34);

(f) The outstanding capital stock of I. U. I. consisted of 40,000 shares Prior Preferred, 40,000 shares 1st Series Preferred, 450,000 shares 2nd Series Preferred and over 2,000,000 shares Common, all without par value (R. 17);

(g) On January 9, 1932, at a meeting attended by certain directors specifically named, the action of the Executive and Finance Committee in directing the payment, as of January 2, 1932, of a dividend of $1.39 per share on the Prior Preferred Stock, was unanimously ratified, confirmed and approved (R. 34);

(h) I. U. I. had no surplus at any time during the years 1929, 1930, 1931 and 1932 but nevertheless cash dividends were paid during each of said years on all classes of its preferred stock, the exact amounts of which cash dividends are unknown to the plaintiffs (R. 24, 34);

(i) The Board of Directors authorized or ratified the actions of the Finance or Executive Committee authorizing the payment of said dividends (R. 34);

(j) Each of said directors had or should have had, in the reasonable exercise of his duties, knowledge of all of said matters (R. 36);

(k) The relief prayed is for an accounting and judgment against defendants in favor of the plaintiffs and others similarly situated by virtue of the acts of defendants hereinabove complained of (R. 37).

For the purpose of the present discussion we do not deem it necessary to consider other allegations setting forth further particulars and evidentiary matter, such as the details of one of the dividends approved at the meeting of January 9, 1932 (Par. 43, R. 34) nor the allegations concerning fictitious income (Pars. 23-29; R. 22-24). As pointed out by the Circuit Court of Appeals (R. 359):

> "From a reading of the original complaint in its entirety, it is our conclusion that it sufficiently describes a cause of action against the defendants for the violation of Sec. 23 of the Corporation Act of 1919.

> We agree with the District Court that it tends to be deficient in details, but we are satisfied that it is not fatally deficient in any essential."

Defendants urge the argument that no present defendant is definitely connected with any act in declaring or assenting to any dividend. However, they do not cite any cases but rely only on their argument that the allegations are not specific and that no individual is charged and consequently the dividends may have been declared or assented to by persons other than cross-petitioners.

The original complaint alleges that all of the defendants were all of the directors during the entire period and charges *all* of them with authorizing or ratifying the declaration of all the dividends. How can it be said, therefore, that no individual director is charged with having done so? See *Loft, Inc.* v. *Corn Products Ref. Co.*, 103 F. (2d) 1, 9 (C. C. A. 7) (Cert. den. 308 U. S. 558).

Where there were a number of directors and a series of meetings at which allegedly wrongful acts took place, the failure to allege details as to attendance and voting does not justify a dismissal of the complaint as that is a matter of evidence (*Cosmopolitan Trust Co.* v. *Mitchell*, 242 Mass. 95, 136 N. E. 403).

The new Rules of Civil Procedure apply in this case. However, it is immaterial whether the original complaint in this case is tested by the former equity rules or by the new Rules of Civil Procedure because the allegations are sufficient whether tested under the former rules or the present rules.

Under Old Equity Rule 25 it was sufficient that a bill in equity should contain "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." Rule 18 of the former rules in equity provides that "* * * the technical forms of pleadings in equity are abolished."

Under the new Rules of Civil Procedure it is provided in Rule 8a (2) that a complaint shall contain

> "a short and plain statement of the claim showing that the pleader is entitled to relief,"

and in Rule 8e (1) that:

> "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

In *Securities and Exchange Commission* v. *Timetrust*, 28 Fed. Supp. 34 (D. C. N. D. Calif.), the court states (p. 41):

> "The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required. Pleadings shall be so construed as to do substantial justice."

The same was held in the following cases:

Van Dyke v. *Broadhurst*, 28 Fed. Supp. 737 (D. C. Pa.);

Fidelity & Deposit Co. v. *National Banking Assn.*, 267 Fed. 367 (C. C. A. 4);

Leimer v. *State Mutual Life Assurance Co.*, 108 F. (2d) 302 (C. C. A. 8).

If a complaint is not sufficiently specific, defendants' remedy is a motion for a more specific statement (see Rule 12-e)—not a motion to dismiss. *Koser* v. *American Fruit Growers, Inc.*, 60 F. (2nd) 313, 315 (D. C. Pa.).

Under either the old Equity Rules or the new Rules of Civil Procedure it seems clear that where the facts upon which the complaint is based are peculiarly within the knowledge of the defendants, the rules must be interpreted even more liberally.

In *State* v. *Illinois Central R. R. Co.*, 246 Ill. 188, 92 N. E. 814, the court said (p. 237):

> "If a matter essential to the determination of the claims of complainant is charged to rest in the knowl-

> edge of the defendant or must of necessity be within his knowledge * * * precise allegations thereof are not required * * *, all the facts need not be set out in the bill. It is sufficient if general statements of fact are made, under which pertinent details can be proved."

Since it appears that there are no cases whatever with which defendants claim the decision of the Court of Appeals on this point is in conflict, and we have cited numerous authorities above to show that the decision is in accordance with the law and with good reason, defendants' application for certiorari on this ground should be rejected.

B. *The allegation that dividends were declared in the first instance by the Executive Committee and thereafter ratified by the Board of Directors, does not relieve the defendants from liability therefor.*

The Circuit Court of Appeals held that the Executive Committee was the creature and agent of all defendants, thereby rendering them liable for the dividends declared by the committee, irrespective of the subsequent ratification by the directors. The Circuit Court of Appeals also held that in any event those directors who were on the Executive Committee were liable for the dividends which they declared. Defendants claim these holdings are in conflict with the law of Illinois, citing *Lewis* v. *Montgomery*, 145 Ill. 30, but it is very apparent that there is no conflict since the facts are entirely distinguishable.

In the case at bar the Executive Committee consisted of some of the directors of I. U. I. All of the directors are defendants in this suit. Those on the Executive Committee were appointed to that Committee by all of the directors. By the by-laws which they adopted the directors empowered the Executive Committee to declare dividends between meetings of the Board (R. 221-222).

Lewis v. *Montgomery*, 145 Ill. 30, upon which defendants

place great reliance, did not involve the statutory liability for declaring dividends but involved the statutory liability for assenting to the creation of excessive indebtedness. The excessive indebtedness in that case was created by an employee of the corporation, whose position as superintendent entitled him to incur indebtedness. The court held that the directors could not rescind the valid obligation of the corporation and that it was their duty to recognize it and provide for its payment. Inasmuch as the directors took no part in creating the debt, the court properly held that their subsequent recognition of it as a valid obligation of the corporation did not constitute "assent" to the creation of indebtedness in excess of the statutory limitation within the meaning of that statute. This is distinguishable from the instant case because the power to declare dividends is solely in directors.

Ryder v. *Alton & S. Ry. Co.*, 13 Ill. 516.
Hamblock v. *Clipper Lawn Mower Co.*, 148 Ill. App. 618.
Robertson v. *Bucklen*, 107 Ill. App. 369.
Spellman on Corporate Directors, Sec. 141.

Certainly directors do not have a duty to pay improperly declared dividends. Even after a dividend has been declared but before it is paid, it could be revoked by the directors and could be enjoined if it would impair capital or render the corporation insolvent (*Coquard* v. *National Linseed Oil Co.*, 171 Ill. 480, 486). A stockholder could not compel payment of such an improperly declared dividend (*Hamblock* v. *Clipper Lawn Mower Co.*, 148 Ill. App. 618). Even after it has been paid, an improper dividend can be recovered from the stockholders who received it (*Johnson* v. *Canfield-Swigart Co.*, 292 Ill. 101, 116 and *Clapp* v. *Peterson*, 104 Ill. 26).

As pointed out above the Executive Committee did not consist of "employees" of the corporation, as was the

situation in *Lewis* v. *Montgomery,* but consisted of directors who were selected by all of the directors.

While directors of a corporation may delegate their duties to others they may not delegate their responsibility:

Fensterer v. *Pressure Lighting Co.,* 149 N. Y. Supp. 49.

Kavanaugh v. *Commonwealth Trust Co.,* 118 N. Y. Supp. 758, 767.

Pennsylvania Iron Works Co. v. *MacKenzie,* 190 Mass. 61.

If, by the simple expedient of appointing an Executive Committee to declare dividends, directors could avoid the statutory liability imposed by Sec. 23 of the Illinois Corporation Act of 1919, then that statute would be wholly nullified because directors could then appoint persons who were not directors on such committee and empower them to declare dividends. Clearly the Illinois legislature had no such intention when it enacted this statute.

Defendants argue that the word "assenting" as used in the statute cannot be construed to include approval and ratification of a dividend after it has been declared by the Executive Committee. However, inasmuch as the directors, when they created the Executive Committee and empowered them to declare dividends, could not relieve themselves of their responsibility for the declaration of dividends, then it is not necessary to consider the meaning of the word "assenting" because the directors "declared" the dividends when, pursuant to the authority which they gave, the Executive Committee declared the dividends. The simple doctrine of *respondeat superior* is applicable to this situation.

In the opinion of the Circuit Court of Appeals in the companion case of *DeMet's Incorporated* v. *Insull,* No. 822 on the Supreme Court's current docket of petitions for a

writ of certiorari, the Court aptly said (R. 346 in case No. 822):

> "In the instant case the Board of Directors empowered an Executive Committee to declare dividends, which of course did not operate to relieve them of the responsibility. We believe that a corporate director participates in a dividend, that is declares or assents to a dividend, under the statute, if he votes to give such an executive committee the power to declare a dividend and this is done, if he himself is an active member of the executive committee which declares a dividend, or if he approves, ratifies or assents to a declaration of the executive committee."

White-Wilson-Drew Co. v. *Lyon-Ratcliff Co.*, 268 Fed. 525, cited by defendants is wholly inapplicable since the allegations of the complaint in that case specifically negatived any participation by the directors in the affairs of the corporation and alleged that they had no knowledge of the wrongful acts, whereas in the case at bar the directors are affirmatively charged with active participation and with having declared or assented to the payment of dividends.

Both *Western Mortgage & Guaranty Co.* v. *Gray*, (Cal.) 8 Pac. (2d), 1016, and *Watkinson* v. *Adams* (Okla.) 103 Pac. (2d) 498, cited by defendants, are clearly distinguishable because the statutes there involved expressly excepted from liability those directors who were not present.

Section 23 of the Illinois Corporation Act of 1919 imposed liability on directors either for declaring or assenting to a dividend. "Assenting" obviously was intended by the legislature to mean something different from "declaring." This question had been directly presented to courts in other jurisdictions and they have uniformly held that ratification or approval of a dividend after it has been declared amounts to "assent":

Walker v. *Man*, 253 N. Y. S. 458, 466-467.

City Investing Co. v. *Gerken*, 202 N. Y. S. 41.

Cunningham v. *Shellman*, 164 Ky. 584, 598.
Williams v. *Brewster*, 117 Wis. 370, 383.
Calkins v. *Wire Hardware Co.*, 267 Mass. 52, 59.

C. *The complaint adequately alleges that the declaration of dividends was an impairment of capital and that dividends were declared while insolvent.*

Defendants cite no cases whatever in support of their contention that impairment of capital or insolvency is not adequately alleged and that the complaint contains mere conclusions. We have already pointed out that under the Rules allegations are sufficient if they contain a concise statement of the nature of the action charged and that details or evidentiary matter are not necessary.

The Circuit Court of Appeals properly held that it was sufficient under Illinois law to make general allegations of insolvency or impairment of capital at the time of the dividends, citing *Kelley* v. *Baggot*, 273 Ill. App. 580, 586, 587, wherein the Illinois court held that a general allegation of insolvency was sufficient, the actual total of assets and of liabilities being a matter of proof. To the same effect is *In re Claudon*, 73 Fed. (2d) 876 (C. C. A. 7).

In the original complaint, it is alleged that the dividends in question were declared and paid at a time when I. U. I. had no surplus. If I. U. I. had no surplus, the dividends could not have been paid except out of capital. It was not necessary for plaintiffs to allege details or plead evidence. The complaint alleges ultimate facts, not conclusions as defendants contend. The ultimate fact of declaring and paying dividends with no surplus out of which to pay them, is a sufficient allegation, either under former United States Equity Rule 25, or under Rules 8-a (2) and 8-e (1) of the present Rules of Civil Procedure, which have been fully discussed under sub-division A

above. These facts were peculiarly within defendants' knowledge.

Furthermore, the proferred amendments set forth in detail the capital structure of the company, its financial condition and its lack of any surplus at all times when the dividends in question were declared and paid (R. 330, 317).

D. *The complaint adequately alleges knowledge by defendants of the financial condition of I. U. I.*

Defendants contend that there are no allegations to show that defendants knew that the corporation was not in proper financial condition to pay the dividends and that they had a right to rely on the books. But according to the allegations of the complaint, these books showed that there was no surplus and on their face contained fictitious bookkeeping entries crediting certain transactions to surplus when in fact they did not represent earnings, in which transactions and booking entries the directors participated (R. 22-24).

Defendants' contentions are completely answered in the opinion of the Court of Appeals as follows:

> "In considering the question presently discussed, it is not, we believe, unreasonable to suppose that directors of a corporation ought to know whether the actual earnings authorize the withdrawal of the corporate assets to pay a dividend, since they alone are responsible for the declaration of dividends even though they may have delegated the power to a committee of their own." (R. 358).

The statute says nothing about knowledge of the company's condition, so that the liability is imposed irrespective of knowledge or lack of knowledge. Even apart from this, paragraph 48 of the original complaint alleges that each of the directors had, or in the reasonable exercise of his duties should have had knowledge, of all such matters

(R. 36) and the amendments likewise allege knowledge by defendants of the financial condition of the company as detailed in the amendments (R. 318).

Directors of a corporation are liable for the payment of improper dividend even though the corporate books show a surplus which was made up of fictitious income or profits. In *Moore* v. *Murchison*, 226 Fed. 679 (C. C. A. 4), a fictitious surplus was built up on the books of the company, out of which dividends were declared. The court said (p. 681):

> "It is difficult to speak of such a performance with moderation. The so-called surplus shown by these book entries was purely fictitious, and must have been known to be so by those in charge of the concern. * * * Directors cannot escape libility when they are in actual charge of the business of the corporation, and know, or ought to know, that the dividends they declare have not been earned."

Same in the following:

Cornell v. *Seddinger*, 237 Pa. 389.

Wesp v. *Muckle*, 120 N. Y. S. 976 (*affirmed* 201 N. Y. 527).

Union Discount Co. v. *MacRobert*, 234 N. Y. Supp. 529.

Quintal v. *Greenstein*, 256 N. Y. Supp. 462.

Chick v. *Fuller*, 114 Fed. 22 (1902), cited by defendants, exonerated only those directors who had not participated in the manipulation of the books and from whom the other directors had concealed indebtedness secretly incurred by them and which was not shown on the books. That is not comparable to the allegations in the case at bar.

E. *The record clearly shows that plaintiffs were creditors at the time the dividends were declared and paid.*

The Circuit Court of Appeals apparently was so little impressed with defendants' argument on this point that it did not even mention it in its opinion. As previously pointed out, paragraphs 13 and 16 of the original complaint (R. 11, 19) specifically allege that plaintiffs purchased their debentures about January 1, 1930, and that the same debentures which they then purchased remained unpaid and owned by the plaintiffs at the time of filing of this suit, namely, February 3, 1933. Therefore, it is clear that plaintiffs were creditors at all times during which dividends were paid after January 1, 1930, and prior to the bankruptcy in April 1932. It also alleges that other members of the public have owned other debentures since January 1, 1929 (R. 6).

In the face of the foregoing allegations defendants' contention that the complaint is fatally defective because it is nowhere alleged that plaintiffs were creditors when the dividends were declared and paid is simply absurd.

Furthermore, the cases cited by defendants are not applicable even if the above allegations did not appear. Both *Graham* v. *Railroad Company*, 102 U. S. 148, and *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, merely held that creditors who had acquired their claims after alleged fraudulent acts occurred could not maintain suits to set aside those fraudulent transactions. In the instant case the rights of plaintiffs are not based on the law pertaining to fraudulent conveyances but under Section 23 of the Illinois Corporation Act giving creditors an additional remedy for the collection of their debts, without regard to when the dividends were declared. The case of *Buell* v. *Lanski*, 232 Ill. App. 500, cited by defendants, is not in point, the court there pointing out that the corporation had no creditors and was solvent when alleged wrongful

payments were made to officers by consent of the stock holders so that in no event was anyone injured.

On the other hand, in *Woolverton* v. *Taylor,* 132 Ill. 197, involving a suit under a statute similar to the one involved in this case, it appeared that plaintiffs acquired notes of a corporation by assignment, after the statutory liability was incurred, and the court held (page 212):

> "The officers, if liable at all, are liable to all the creditors of the corporation,—those existing prior to the contract creating the excessive indebtedness, those whose debts are created thereby, and also those who may afterwards become its creditors."

F. *This suit is brought in behalf of all creditors.*

We do not dispute defendants' contention that the liability under Section 23 of the Illinois Corporation Act of 1919 is personal to the creditors and that a suit to enforce the liability must be brought by one or more creditors on behalf of all creditors. The record shows that this suit was brought on behalf of all creditors (R. 2-3). The prayer of the bill is for judgment against the defendants in favor of the plaintiffs and all others similarly situated (R. 37). As a result of the so-called bank settlement referred to in *Aiken* v. *Insull,* case No. 821 before this court, the debenture holders of I. U. I. are its only creditors (R. 136-138).

G. *Section 23 of the Illinois Corporation Act of 1919 is not unconstitutional.*

Because the last sentence of the statute imposing the liability provides that a director shall be conclusively presumed to have assented to a dividend unless he was absent from the meeting, or unless his dissent therefrom is entered on the corporate records, defendants claim that this provision invades the judicial field and therefore the entire statute is unconstitutional.

The opinion of the Circuit Court of Appeals (R. 361) adequately disposes of this contention by pointing out that the statute imposing the liability is not dependent on the provision in question and that Section 23 with the last sentence omitted is not dissimilar in substance to its predecessor, Section 16 of the Corporation Act of 1872, the constitutionality of which has never been questioned. Furthermore, as pointed out by the Court of Appeals, defendants are not injured by the so-called conclusive presumption since plaintiffs have not thus far attempted to invoke that presumption. This Court should not be asked to review merely academic questions. The amendments charge defendants with actually voting for and assenting to the dividends. Certainly, if upon the trial the evidence should establish the defendants' liability without reference to that presumption, defendants will not have been injured at all.

The provision in question is not an essential and integral part of the statute as clearly appears from the fact that such statutory liability had been on the books of Illinois since at least 1872 without that sentence, so that it cannot be presumed that the legislature would not have enacted the statute without the provision in question, as was the case in *Chicago Motor Club* v. *Kinney*, 329 Ill. 120.

We believe the foregoing is a complete answer to defendants' contention; but even without that disposition of the point, the so-called conclusive presumption is not unconstitutional.

The statute does not provide that the absence of a director from a meeting must appear on the corporate records or that it is conclusively presumed that he is present when in fact he is absent. Hence, his absence may be shown by parol. A director may show that he was absent from the meeting and thus free himself from any conclusive presumption of assent. That does not suggest unconstitution-

ality. Likewise, his dissent, if entered in the corporate records, precludes any presumption against him. If the corporate records erroneously show him present, when in fact he was absent, or show assent instead of dissent, he still is not precluded from declaring the truth, for he may by an appropriate direct action have the records corrected in accordance with the facts:

Ford v. *Ford Mfg. Co.*, 222 Ill. App. 76, 82.
Dennis v. *Joslin*, 19 R. I. 666.
4 Fletcher's Ency. of Corps. (1933), p. 4051.
Venner v. *Chicago City Railway Co.*, 246 Ill. 170, 176.
Indian Refining Co. v. *Buhrman*, 220 Fed. 426.

Furthermore, the provision in question is not a conclusive presumption of evidence but is in reality a rule of substantive law, that is, it simply defines "assenting" to include the presence of a director at a meeting at which the dividend is declared and the failure of the director to dissent from the action. That effect would result if the words "conclusively presumed" were omitted from the clause. As has been shown, no director is prevented from having the records speak the truth or from proving his absence from a meeting and therefore he is not deprived of any right at the trial. The clause creates a rule of substantive law and not a rule of evidence (*In re Buchanan*, 171 N. Y. Sup. 708, 710; Wigmore on Evidence, 2d Ed. 1923, Section 1353).

Section 23 of the Corporation Statute and its predecessor, Section 16, have been enforced in a long line of decisions in this State. The fact that a statute has been sanctioned and acquiesced in for many years will have great weight with the Court in determining its constitutionality.

Cases cited by defendants are inapplicable. Neither *People* v. *Rose*, 207 Ill. 352, nor *Hall* v. *Woods*, 325 Ill. 114,

held the statutes there involved to be unconstitutional. *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62, condemned a statute because it declared something to be a fact which everyone knows is not a fact, that is, that the mixture of certain harmless, healthful food products produces an adulterous food and because any one accused of making such a mixture was denied any opportunity to rebut its presumed unwholesome character. That is not comparable to the situation here.

H. *The statutory liability is not penal but contractual.*

Defendants' contend that the statute is penal and therefore it cannot be enforced in equity, and further that the federal courts will not enforce a penal law of a state. But defendants err in their premise. Defendants are incorrect in arguing that the statute *prohibits* the directors from declaring such dividends and *punishes* them for violation of their duties. There is not one word in the statute, express or implied, which prohibits directors from declaring these dividends; the declaration of the dividends is not made illegal, it merely provides that directors will be answerable for the debts of the corporation in case they declare or assent to dividends under the circumstances stated. As stated by the Court of Appeals (R. 361):

> "It is, both in form and substance, a private obligation, similar, in many respects, to that of sureties, and it was intended to offer additional security to the creditors."

Citing:

Low v. *Buchanan*, 94 Ill. 76.
Woolverton v. *Taylor*, 132 Ill. 197.
Vestal v. *Robertson*, 277 Ill. 425, 431.
In re Beachy & Co., 170 Fed. 825, 828.

Defendants rely on *Vestal* v. *Robertson*, 277 Ill. 425, but that case is against their position and in favor of

plaintiffs. The court there, in considering a question under the statute of limitations, held one section of the Corporation Act to be a suit to recover a penalty where it made persons who assumed to exercise corporate powers *without complying with the provisions of the Act* personally liable for the debts contracted in the name of such pretended corporation. But the reason the court held that section to be penal was that the other provisions of the Act required, as a condition precedent to the exercise of corporate powers, that certain documents be filed with the Secretary of State and be recorded, the failure to do which gave rise to the penalty provision which was the basis of the suit. In other words, the Statute there *prohibited* the defendants from acting in a corporate capacity and *punished* them for having done so. That case particularly distinguished the case of *Woolverton* v. *Taylor,* 132 Ill. 197, in which it was held that subdivision 1 of the statute, which is involved in the case at bar, was not a penal statute because it contains no provision, express or implied, prohibiting directors from incurring liability in excess of the capital stock, but by imposing liability on directors therefor gave a contractual remedy directly to the creditors.

In re Beachy & Co., 170 Fed. 825, involving the statute at bar, pointed out that by a long line of decisions in Illinois it has been held that the Statute here involved is not penal but remedial and contractual in nature and is intended to furnish creditors protection in the nature of a suretyship; and that it is peculiarly a remedy to be enforced in a court of equity in a proceeding where the fund may be distributed among all creditors. Among the cases cited are *Hornor* v. *Henning,* 93 U. S. 228, *Low* v. *Buchanan,* 94 Ill. 76, *Woolverton* v. *Taylor,* 132 Ill. 197. Other cases to the same effect are *Pick* v. *Warshauer,* 244 Ill. App. 56; *Cairo Meal & Cake Co.* v. *Brigham,* 268 Ill. App. 510, *McCutcheon-Gerson Service* v. *T. & R. Co.,* 236

Ill. App. 261, *Seegmiller* v. *Day*, 249 Fed. 177, *Stone* v. *Chisolm*, 113 U. S. 302.

That the Federal Courts will enforce State statutes of this type abundantly appears from the foregoing cases, as well as *Huntington* v. *Attrill*, 146 U. S. 657 and *James-Dickinson Farm Mortgage Co.*, v. *Harry*, 273 U. S. 119.

I. *The proffered amendments were entitled to be filed.*

To supply the details which the District Court felt were lacking in the original complaint, plaintiffs offered certain amendments (R. 299-311, 317), which the District Court refused to allow, but which the Circuit Court of Appeals held should have been permitted. These amendments show in complete detail the part played by each defendant with respect to the authorization, declaration, approval or ratification of each dividend, the dates of the meetings, the names of the directors present at each meeting and how each voted, the amounts of dividends and details thereof, the capital structure of the corporation and its financial condition at the times when the dividends were declared.

The supplying of these details was not the statement of any new cause of action, nor did it change the plaintiffs' claim nor present a different theory of liability. They merely stated more fully the same matter contained in the original complaint. Therefore, the Statute of Limitations cannot affect the filing of the amendments. Under Rule 15-c of the Federal Rules of Civil Procedure, the amendments relate back to the date of the original pleadings. See *Echevarria* v. *Texas Co.*, 31 Fed. Supp. 596; *Perry* v. *Southern Railway Co.* 29 Fed. Supp. 1006, *White* v. *Holland Furnace Co.*, 31 Fed. Supp. 32, *Brown* v. *New York Life Insurance Co.*, 32 Fed. Supp. 443.

Even under the old rules the amendments would not be subject to the Statute of Limitations for the same reason

that they do not state a new cause of action but merely an amplification of the original pleadings. See *New York Central & H. Rd.* v. *Kinney,* 260 U. S. 340; *Clinchfield R. Co.* v. *Dunn* (C. C. A. 6, 1930) 40 Fed. (2) 586; *La Cueva Ranch Co.* v. *Brewer,* (C. C. A. 7, 1927), 23 F. (2) 369; *In re Claudon* (C. C. A. 7, 1934) 73 Fed. (2) 876, *Seaboard Airlines* v. *Renn,* 241 U. S. 290.

Under the Illinois law the rule is the same. (*Metropolitan Trust Co.* v. *Bowman Dairy Co.,* 369 Ill. 222).

Since the amendments are not barred by the Statute of Limitations, the Court of Appeals properly held that the mere lapse of time under the circumstances here did not justify the District Court in refusing to permit them to be filed and in dismissing the case.

It is clear that plaintiffs were not guilty of any unjustifiable delay. The record conclusively shows that under the District Court rules the defendants could have called up the motion to dismiss at any time (R. 330); that briefs of both sides as to the questions involved in the motions to dismiss had been filed by both sides and the matter taken under advisement by the District Court (R. 56); that by agreement of both sides disposition of the motions was continued generally (R. 59). The intervening period was devoted in the main to the disposition of the suits against the banks and their settlement (referred to in *Aiken* v. *Insull,* No. 821) which benefited defendants to the extent of the amount collected by debenture holders from the banks.

The ruling of the Circuit Court of Appeals that the amendment should have been permitted was in accordance with the spirit of the new Rules of Civil Procedure, Rule 15 (a), which provides that "leave shall be freely given when justice so requires." See *Mims* v. *Reid,* 275 Fed. 177 (C. C. A. 4); *McDonald* v. *State of Nebraska,* 101 Fed. 171 (C. C. A. 8); *Taylor* v. *Spurway,* 72 F. (2d) 97 (C. C. A. 5).

The decision of the Circuit Court of Appeals on these points is eminently just and in accordance with the applicable law of the State of Illinois and of the federal courts.

II.

The courts below correctly held that the complaint made a sufficient showing that the requisite jurisdictional amount is involved.

At the outset defendants are in the inconsistent position of asking this Court to affirm the District Court's judgment entered in their favor and, at the same time, of asking this Court to find that the District Court had no jurisdiction whatsoever.

In their cross-petition the defendants reargue the question of jurisdictional amount and present the same arguments on which they were overruled by the District Court and again by the Circuit Court of Appeals.

The first point argued by defendants (p. 24) is that "there is no basis for computing the amount of the dividend authorized or paid." The defendants admit that paragraph 43 alleges that a dividend of $1.39 a share on preferred stock was authorized but claim that there is no allegation as to how many shares of preferred stock were outstanding at that time. The defendants overlook paragraph 15 of the complaint in which it is definitely stated that the preferred stock issue amounted to 40,000 shares (R. 17).

The next point argued by defendants is that the complaint must affirmatively allege the facts to make it clear that the jurisdictional amount is present. The defendants persist in refusing to recognize the rule that so long as the complaint alleges in good faith that more than $3,000 is involved, it need not allege the evidence to prove the nature and extent of the damages. It is only when the

allegations in the complaint make it clear to a legal certainty that the claim is actually for less than the jurisdictional amount that the general allegation of jurisdictional amount will be disregarded. Defendants would reverse the rule by arguing that the complaint must affirmatively allege sufficient evidentiary facts to prove that the matter involves more than $3,000. The true rule has been recently repeated in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 293 (pp. 288-9):

> "The rule governing dismissal for want of jurisdiction in cases brought in the Federal Court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

In their last argument the defendants object to the reference by the Circuit Court of Appeals to the plaintiffs' Counter Motions and Answers on Facts and the amendments to the complaint. Inasmuch as the Circuit Court of Appeals held that the plaintiffs are entitled to file their amendments to the complaint, the amended complaint may be considered as being the complaint now on file in this case in respect to which the defendants' attack is directed. There can be no question but that the amendments to the complaint, with their wealth of detailed information concerning the amounts and dates of the payments of dividends on the preferred stock, make it perfectly clear that many millions of dollars are involved in this suit and that the jurisdictional amount is present (R. 300-308). Of course, a complaint may be amended to cure whatever defects may exist in the original complaint as to the allegations of jurisdictional amount. In respect to the reference by the Circuit Court of Appeals to the plaintiffs' sworn Counter Motions and Answers on the Facts, the facts therein contained relating to jurisdictional amount

are in the Record (R. 251-3) and are admitted by the defendants (R. 282, 279-281, 289). These additional facts make it manifest that the jurisdictional amount is present.

In *Smith* v. *McCullough*, 270 U. S. 456, the court amended the complaint in order to have it include necessary jurisdictional facts appearing elsewhere in the record and said (p. 460):

> "The suit was begun in 1916; the parties had two hearings in each of the courts below; and the merits were exhaustively presented. In these circumstances to amend the bill now to conform to the jurisdictional fact indisputably shown elsewhere in the record will not subject either party to any prejudice or disadvantage, but will subserve the real interests of both. This court has power to allow amendments of this character (Rev. Stat. Sec. 954, Comp. Stat. Sec. 1591, 6 Fed. Stat. Anno. 2d ed. p. 98; *Norton* v. *Larney, supra; Realty Holding Co.* v. *Donaldson*, 268 U. S. 398, 69 L. ed. 1014, 45 Sup. Ct. Rep. 521), and the propriety of exercising it in this instance is obvious. We therefore shall treat the bill as amended, by our leave, to show the jurisdictional fact conformably to other parts of the record. With that fact brought into the bill, there can be no doubt that there was Federal jurisdiction."

In *Whalen* v. *Gordon*, 95 Fed. 305 (C. C. A. 8), the court said (p. 307):

> "The case appears to have been one, therefore, in which there was a sufficient amount in controversy to give the court jurisdiction, but the defendants in error had failed to plead it. Where the facts warrant the exercise of the jurisdiction of the court, but the pleader has failed to state them properly, the court is not deprived of the usual power to permit him to do so by amendment by the mere fact that the amendment will constitute or contain a jurisdictional averment."

The defendants conclude their argument on this point by stating that "on this ground of failure to allege facts as to amount involved to show jurisdiction in a federal

court the complaint was properly dismissed" (p. 25). It should be kept in mind that the complaint was not dismissed by the District Court for failure to properly allege the jurisdictional amount. The District Court concluded that it had jurisdiction of the parties and subject matter and except for the motions specifically allowed, all other motions, including the motion to dismiss for lack of the requisite jurisdictional amount, were denied (R. 297).

The cases cited by defendants are not in point. The first case cited by defendants, *Smith* v. *McCullough*, 270 U. S. 456, did not involve any question of jurisdictional amount and as pointed out above, it supports our position that the complaint may be amended by facts which appear elsewhere in the record. In another case cited by defendants, *Mutual Life Insurance Co.* v. *Thompson*, 27 F. (2d) 753, the court allowed an amendment to clarify the allegation as to jurisdictional amount and said (p. 755):

> "However, federal jurisdiction, in a case of this kind, is not necessarily defeated by even an impossibility of arriving at the exact value, or by difficulty in approximating the value, of the object sought by the bill. If this object has a pecuniary value, and if that value could exceed $3,000, the court cannot, on motion to dismiss, refuse to accept as true an allegation that the value of the object sought exceeds the jurisdictional minimum."

As to other cases cited by defendant, in *Hanford* v. *Davies*, 163 U. S. 273, no question of jurisdictional amount was involved, while *Norton* v. *Larney*, 266 U. S. 511, is another case in which the court itself amended an insufficient complaint to include jurisdictional facts appearing elsewhere in the record.

Hence, the positive allegation in the complaint that "the matter in dispute herein, exclusive of interest and costs, exceeds the sum of $3,000" (R. 3), must control as a sufficient allegation to base the jurisdiction of this Court and, in any event, the amendments to the complaint contain sufficient detailed evidence to satisfy anyone (R. 300-308).

III.

The decisions of the courts below, that the plaintiffs were not collusively selected in order to confer federal jurisdiction, are in accordance with applicable federal decisions.

At the outset, we should like to correct a typographical error in cross-petitioners' quotation from a portion of the opinion of the Circuit Court of Appeals (p. 25) wherein a portion of the opinion is quoted as follows:

> "The record presents a situation where certain creditors having a justifiable interest in the controversy * * *."

The word "justifiable" should properly read "justiciable" (R. 362).

The burden of cross-petitioners' argument with respect to collusive selection is that because out of 1500 debenture holders who were members of the debenture holders "Committee of 1,000" (one-third of whom being residents of Illinois) twenty-nine non-residents were chosen by the attorneys for the debenture holders or by a person acting at the behest of the attorneys, such manner of choosing plaintiffs amounted to collusion as would warrant the trial court in dismissing the cause for want of jurisdiction.

Cross-petitioners would have this Court believe that strangers to the litigation or "straw men" were plucked out of the air in order to create a spurious diversity of citizenship in order to gain access to the Federal Court. That is not true. The twenty-nine persons selected as plaintiffs were all owners of I. U. I. debentures, and had, prior to the institution of the suit, given their respective powers of attorney

> "to institute * * * any and all suits, actions and proceedings in the name of, or on behalf of, the undersigned * * * in any part of the world where such actions may be brought * * *." (R. 467.)

The most that can be said of cross-petitioners' position is that out of the large group of resident and non-resident debenture holders, a few non-residents were chosen to be plaintiffs in order to gain access to the Federal Court. That is definitely not collusion. The authorities are in complete accord that collusion with regard to maintaining suit in Federal Courts, as condemned in Section 37 of the Judicial Code (28 U. S. C. A. 80), is presented only by a situation where a person not a real party in interest and having no justiciable controversy is given or assigned a chose in action in order to create an artificial or spurious diversity of citizenship, or where a corporation which is the real party in interest designedly refuses to bring suit in order to enable a non-resident stockholder to maintain action in a Federal Court.

All but one of the cases cited by cross-petitioners involved situations where the party plaintiff was not a real party in interest, had no justiciable interest in the controversy and was a mere "straw man" or a stranger who was injected into the lawsuit merely to create a spurious diversity of citizenship. The other case cited by cross-petitioners, *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, was not strictly speaking a question of collusive selection but turned upon the proposition that a necessary party was made a party defendant to create a false diversity of citizenship when that person obviously should have been joined as a party plaintiff.

It has been enunciated by this Court in numerous decisions that so long as a basis for Federal jurisdiction actually exists, the courts will not inquire into the motive behind the preference for a Federal rather than a State forum. That proposition was decided by this Court in the *Matter of Reisenberg*, 208 U. S. 90, wherein this Court said (p. 111):

> "So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant."

In

Black and White T. & T. Co. v. *Brown and Yellow T. & T. Co.*, 276 U. S. 518,

this Court held that the action of a Kentucky corporation doing all its business in that state in dissolving and reforming under the laws of Tennessee for the sole purpose of enabling it to gain access to the Federal courts in a contemplated action against another Kentucky corporation, was not collusive, and said (524):

> "The motives which induced the creation of respondent to become successor to its Kentucky grantor and take a transfer of its property have no influence on the validity of the transactions which are the subject of the suit. The succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding concerning their jurisdiction."

A case identical to the one at bar as respects the question of collusive selection, is that of

New Albany Waterworks v. *Louisville Banking Co.*, 122 Fed. 776 (C. C. A. 7).

There a bill was filed in the Circuit Court of the United States for the District of Indiana by a Kentucky corporation, plaintiff, as a stockholder of an Indiana corporation, defendant, to set aside a lease and for injunctional and other relief. In addition to the Indiana corporation, five of its directors and the City of New Albany, Indiana, were also made defendants. Objection to the jurisdiction of the court was made on the ground that while the suit was motivated by a group of stockholders, many of whom were residents of Indiana, said group chose a nonresident stockholder to become the plaintiff in order to confer federal jurisdiction. Appeal there was had from an order in the trial court granting an injunction and appointing a receiver. The order was affirmed and the court said as respects the question of jurisdiction, at 778-9:

> "The appellants' objection to jurisdiction of the bill

> is untenable. It rests upon the proposition that the answer charges, without denial, that certain of the minority stockholders of the defendant New Albany Waterworks, who are citizens of Indiana, 'combined with the appellee, a citizen of Kentucky, and caused it to bring the suit' in the federal court. * * * Neither the fact of citizenship of the other stockholders, majority or minority, nor of their attitude to the controversy, by contribution or otherwise, is material to relief under the bill, if the management of the corporation is adverse to the objects of the bill, and is not in collusion with the complainant in any sense."

That decision clearly enunciates the proposition that it is not collusive or in any way wrongful for a class of stockholders or creditors, as the case may be, to choose one or more persons of the class to become the named plaintiffs in order to confer federal jurisdiction, as long as such plaintiffs have a real and justiciable interest in the controversy. Furthermore, it is difficult to see how it can be said that plaintiffs had no "justiciable interest" when it is not disputed but that they are actual bona fide owners of the debentures sued on. In other words, it is not denied that they had an actual interest subject to being litigated.

Another case wherein selection of plaintiffs was had in a manner similar to the one at bar was that of

> *Hutchinson Box Board and Paper Co.* v. *Van Horn*, 299 Fed. 424 (C. C. A. 8),

an action by a non-resident stockholder against the corporation in which he owned stock and another corporation to cancel a contract between the two. The action was brought in the United States District Court for the District of Kansas. It appeared that the named plaintiff, who was a resident of Colorado, had contacted a Kansas attorney named Malloy with reference to a proposed suit and that Malloy desired to bring suit in the Federal Court.

Subsequently, Malloy learned that certain local stockholders contemplated bringing an identical suit in the state court but preferred, however, that it might be brought in the Federal Court; whereupon negotiations were had between the plaintiff and the local stockholders which resulted in a contract between all such stockholders to the effect that the non-resident would bring suit in his name in the Federal Court; that he would not dismiss the same without the consent of the local stockholders and that the latter would indemnify him for any expenses, etc. Motion to dismiss for lack of Federal jurisdiction was made on the ground of collusion between the plaintiff and the local resident stockholders, which alleged collusion was predicated upon the contract between the two groups. This motion was overruled and upon trial decree was had for plaintiff. On appeal, the decree was affirmed. With respect to the question of collusion, the court said (429):

> "And as said by the court in the *Albany Waterworks* case, *supra*, the fact that local stockholders may have induced him to file the bill and contributed to the expense does not make the suit collusive. * * * The utmost that can be said of the contract is that appellee therein agreed, in consideration of a contribution, on the part of certain local stockholders, to the preliminary expenses, to commence and prosecute the action in good faith for the benefit of all interested parties, and not to make a compromise of the litigation beneficial to himself and detrimental to the general interests. This in our opinion is not sufficient to make the contract collusive."

The court in the above cited case went much farther in holding there was no collusion than is necessary in the case at bar. In that case there was a contract between local stockholders and a non-resident stockholder that the latter should maintain suit in his name and that he would be indemnified and his expenses paid by the local stockholders. In the case at bar the most that could be said to

support the claim of collusion is that out of the group of creditors certain non-residents were chosen to bring suit, and there is no element of a contract for indemnification, etc., as existed in the *Hutchinson* case.

Cross-petitioners appear to rely principally upon *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, to the effect that:

> "When the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed." (Cross-Petition, p. 28.)

However, as we have heretofore stated, the *Dawson* case was not one of collusive selection but merely of improper alignment of parties for the purpose of creating a spurious diversity. In the instant case there has never been even a suggestion that the parties in the litigation have been aligned in other than their true or normal position in the controversy.

Even without the full and extensive authority contained in the uniform contract involved here, it is perfectly permissible for attorneys representing a large class or group of creditors or stockholders to pick at random a few from the group to become named plaintiffs, or to choose several non-residents from the group in order to confer federal jurisdiction, *as long as the named plaintiffs chosen are bona fide members of the class, have a justiciable interest in the controversy and are not mere "straw men" brought into the picture from outside the class.* The fact that the secretary of the committee, acting under the direction of the attorneys, may have performed the actual "picking" rather than the attorneys personally, is not worthy of discussion.

IV.

Plaintiffs' attorneys had authority to commence and prosecute this suit.

Defendants filed a motion to require plaintiffs' attorneys to show by what authority they had commenced and were prosecuting this suit (R. 471). Plaintiffs' attorneys replied setting forth written contracts from each of the several plaintiffs (R. 474). These contracts employed plaintiffs' attorneys

> "1. To collect all moneys due upon the Insull Utility Investments, Inc., Debentures listed below the name of the undersigned.
>
> "2. To institute, prosecute, join and participate in any and all suits, actions and proceedings in the name of, or on behalf of, the undersigned and that you may deem advisable in furtherance of such collection, in any part of the world where such actions may be brought or may at any time be pending." (R. 467.)

There was a hearing in the District Court on the question of whether this document was sufficient authority to authorize plaintiffs' attorneys to file this suit in the light of all the circumstances (R. 488). Among the circumstances surrounding the execution of this document was the fact that the Insull Debenture Holders Protective Committee had sent out a letter to debenture-holders on October 5, 1932, urging that each addressee join with the committee and execute the contract quoted from above, a copy of which was enclosed with each letter. These letters stated, among other things, that the Committee's attorneys were "laying the foundation for suits to establish liability against directors who voted * * * dividends from capital" (R. 478). A similar letter sent out October 20, 1932, stated that the Committee's attorneys had elicited information tending to establish "liability of directors who voted * * * dividends from capital" (R. 479).

The statement in the last sentence of part IV of the cross-petition that the contracts were "solicited in connection with the bankruptcy proceeding" is not supported by the record and is not true.

We have no quarrel with the principle of law urged by defendants in part IV of their cross-petition. A suit commenced by an attorney without color of authority from the plaintiff is admittedly a nullity. In this case there was specific written authority to collect moneys due upon the debentures and to institute any suit deemed advisable in furtherance of such collection. Nothing in the contract purported to limit the sources of that collection to the funds of Insull Utility Investments, Inc., the obligor on the debentures. On the contrary every circumstance surrounding the execution of these contracts and, indeed, the contracts themselves, show beyond any doubt that the parties to the contract (the debenture-holders and plaintiffs' attorneys) contemplated collection from other sources.

In the first place, Insull Utility Investments, Inc., had been adjudicated a bankrupt. The fact that the assets in the hands of the receiver in bankruptcy had a value of but a minute fraction of the total of its obligations had been widely publicized. Enclosed with the above-quoted letters of October 5 and October 20, 1932, there was, in addition to the contract, a form for filing proof of claim in bankruptcy, which included a power of attorney running to the senior partner of each firm of attorneys representing plaintiffs (R. 483). No action beyond the filing of proof of claim in bankruptcy was necessary, or indeed could have been undertaken, to collect from the assets of the bankrupt whatever small percentage of his claim each debenture-holder might expect to receive from that source. The contract was obviously for the purpose of employing attorneys to collect the money due the debenture-holder

from other sources. Any other construction makes paragraph 2 of the contract quoted above completely meaningless. Further, in that part of the contract dealing with compensation of plaintiffs' attorneys there was a specific reference to "any proceeding at law, equity or bankruptcy" (R. 468).

Defendants argue that this is not a suit to collect moneys due upon the debentures but is a penal action against persons who are not parties to the debentures. As shown in part I-H of this brief, this suit is not penal in character. On the contrary, it was held by the Supreme Court of Illinois in *Woolverton, et al.* v. *Taylor, et al.*, 132 Ill. 197, that when, by reason of some provision of the Illinois Business Corporation Act, directors become personally liable for the debts of the corporation, that liability is not penal but in the nature of security to the creditors. An attorney employed by a client to collect all moneys due on an obligation not only has the authority to look to the security for that obligation, but would be negligent in his duty and subject to censure if he failed to make every effort to resort to such security to collect the money due to his client.

The liability of the directors to plaintiffs is clearly based upon the debentures and the ownership thereof by plaintiffs. If no money were due them upon the debentures, this suit could never have been started. The principal amount of the debentures plus accrued interest clearly limits the liability of the directors. A suit against the directors was exactly what was contemplated by the contract. Defendants' contention requires that all of the surrounding circumstances be ignored, that all of the contract itself be ignored except paragraph 1 quoted above, and that to paragraph 1 there be attributed a meaning strained and twisted out of all recognition.

In defendants' cross-petition there is an indication that

only five of the plaintiffs were advised of the filing of this suit. Since all plaintiffs had given written authority to start the suit, notice of its filing is immaterial with respect to the question of plaintiffs' attorneys' authority and, in fact, every plaintiff was notified (R. 474).

Since the District Court ordered, adjudged and decreed that the attorneys for plaintiffs had established their authority to commence this suit, and since no appeal from that order was taken by defendants, the question is not reviewable by this court.

The District Court ordered, adjudged and decreed that the attorneys for plaintiffs had established their authority to commence this suit (R. 321). The defendants did not file any appeal or cross-appeal from this portion of the decree. Plaintiffs therefore objected to the consideration of this matter in the Circuit Court of Appeals. Nevertheless, the matter was considered by the Circuit Court of Appeals which, in its opinion, stated:

> "The District Court investigated this matter thoroughly and concluded that the attorneys for plaintiffs had authority to prosecute these proceedings. We see no reason for disturbing this conclusion." (R. 362.)

The law is well-settled that an appellee who has not filed a cross-appeal can properly address his argument only to matters in support of the decree below, and is precluded, by failing to cross-appeal, from urging any matter in derogation of the trial court's decree or any portion thereof. In *Peoria & P. U. R. Co.* v. *U. S.*, 263 U. S. 528, suit was instituted by a railroad to enjoin the enforcement of an Interstate Commerce Commission order. The Government objected to the venue and was overruled. The injunction sought was denied and the suit dismissed. On appeal to the Supreme Court the Government, in addition to arguing the merits, also contended that the decree

should be affirmed because its objection to the venue should have been sustained. This Court, however, held that by failing to interpose a cross-appeal, the Government was precluded from again raising the question of venue. We see no reason why this Court should adopt a different rule in the case at bar.

Even if the relief which might have been sought by cross-appeal would have been substantially the same as that already received by the defendants, still, if it differs in any degree from that awarded in the decree appealed from, then it is up to the defendants as appellees to have saved their question by cross-appeal. See *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191.

V.

Both the District Court and the Court of Appeals properly held, in accordance with the Illinois law, that the covenants not to sue given four of the defendant-directors did not discharge the other defendant-directors.

In June, 1937, the defendants and their counsel discussed with representatives of the plaintiffs the advisability of joining with the banks in the settlement of the claims of the debenture holders against them or in purchasing their peace by obtaining covenants not to sue (R. 242). The attorneys for defendants, Ferguson and Tobey, presented to plaintiffs' attorneys information concerning the financial responsibility of their clients and facts to show that a large decree against them could not be collected. For the purpose of avoiding further defense of the suit as to them, but so as not to prejudice this suit as to the other defendants, those two defendants proposed to pay sums within their means in consideration of covenants not to sue them further (R. 243).

Thereupon, in accordance with the provisions of their contract of employment, plaintiffs' counsel presented the

matter to the executive committee of the Insull Debenture Holders Protective Committee of 1,000, and pursuant to due resolutions adopted by that committee, Lewis F. Jacobson, under date of July 17, 1937, executed to the defendants, Tobey and Ferguson, covenants not to sue in consideration of $7500.00 paid by each of them (R. 244).

The covenants not to sue (R. 269) are in the usual form of such instruments and specifically provide that neither the transaction nor the instrument is or intended to be a release or discharge of any one, including the covenantees, nor an accord or satisfaction, nor a settlement discharging any claim or cause of action, nor that the money paid thereunder was accepted or received as compensation (R. 269-271). In addition, the covenantees acknowledged that the instruments expressed the complete transaction and intention of the parties (R. 272).

Pursuant to the above, on July 17, 1937, an order was entered by the District Court on stipulation dismissing this suit as to the defendants, Tobey and Ferguson (R. 64).

Some months later similar arrangements were made with the defendants Budd, who paid $10,000, and Brewster, who paid $25,000. Similar covenants were given them (R. 244-245) and on October 4, 1937, on stipulation they were dismissed as defendants in this suit (R. 65).

The amount of the damages to the plaintiffs and the other debenture holders is greatly in excess of the $50,000 paid by these four defendants (R. 246). In fact, the statutory liability of defendants for declaring dividends out of capital is over $7,000,000 (R. 252).

The District Court denied defendants' Second Motion for Summary Judgment and held that "the effect of the settlement with the four defendants was a covenant not to sue and therefore not a bar to this action" (R. 298). The Circuit Court of Appeals found that the conclusion of the District Court on this point was correct (R. 363).

In Illinois it is clearly settled that a covenant not to sue given to one or more joint tort-feasors is not a bar to prosecution of the cause to action against the other joint tort-feasors. These principles are clearly stated in the leading case on the subject, *City of Chicago* v. *Babcock*, 143 Ill. 358, in which the Court said (p. 366):

> "Where there are a number of tort-feasors, the party injured may, at his election, sue one, or several, or all; and where the suit is against one or some of the wrongdoers, but not against all, the person or persons sued have no right to complain. And so, also, where there is suit against several tort-feasors, the dismissal of the suit against one does not bar the action against the others. (*Knapp* v. *Roche*, 94 N. Y. 329; *Sloan* v. *Herrick*, 49 Vt. 327; *Bloss* v. *Plymale*, 8 W. Va. 393).
>
> "A *release* to one of several joint tort-feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others.
>
> "Here, there is no claim of a technical release under seal. The pending suit against LeCardi was dismissed, and a written agreement was signed that no action should be begun against LeCardi by appellee. This, on its face, was simply an agreement or *covenant not to sue*. The legal effect of such a covenant is not the same as that of a release.
>
> "A covenant not to sue a sole tort-feasor is, to avoid circuity of action, considered in law a discharge, and a bar to an action against such tort-feasor. But the rule is otherwise where there are two or more tort-feasors, and the covenant is with one of them not to sue him. In such case the covenant does not operate as a release of either the covenantee or the other tort-feasors, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them."

Defendants do not challenge this well-established rule but argue that notwithstanding the fact that the instrument was in the form of a covenant not to sue, the circumstances show that there was in fact a release or accord and satisfaction. Their contention is not supported by any evidence

whatever but simply on two arguments (defendants' brief, p. 33). The first is that it is incredible that four of the defendants would have paid $50,000 merely for a contract that they would not be sued, that they must have been convinced that they would be free from any further liability, and that a suit brought at this late date would be barred by laches and the Statute of Limitations.

This argument of the defendants is without any substance whatsoever. Defendants do not make a single reference to the Record to support their argument. There is absolutely nothing in the Record to suggest even remotely that the parties intended to execute a release or an accord and satisfaction. Nothing in the Record contradicts the actual terms of the covenant not to sue or the acknowledgment by the covenantees that the covenant accurately states the nature of the transaction (R. 269-272).

It clearly appears that the liability of the defendants runs into millions and that the $50,000 did not pay those damages in full nor was it accepted as full compensation of those damages. It therefore is manifest that defendants cannot rely on the exception laid down in the *City of Chicago* v. *Babcock, supra,* relating to an actual accord and satisfaction.

The argument that the four directors would not have been foolish enough to pay $50,000 simply for covenants not to sue is absurd. They were faced with possible judgments against them for millions of dollars and expensive litigation. They had the advice of experienced counsel and were satisfied that it was desirable to purchase their peace for relatively nominal sums. In any event, they bargained for covenants not to sue, paid their money for covenants not to sue, and the Illinois law in respect of covenants not to sue controls the situation.

The defendants' argument that they are released because four of the defendants were dismissed from the case

and a suit brought at this late date against the four defendants would be barred by laches and the Statute of Limitations, is contrary to the Illinois law. That is established not only by *City* v. *Babcock, supra,* but also by many other cases in Illinois following the same principles, such as:

Chicago & Alton Ry. Co. v. *Averill,* 224 Ill. 516, 517, 521.
West Chicago St. R. R. Co. v. *Piper,* 165 Ill. 325, 338.
Puck v. *City of Chicago,* 281 Ill. App. 6, 11.
Onyschuk v. *Vincent,* 277 Ill. App. 414, 428.
Baxter v. *Rothschild,* 204 Ill. App. 346 (Abst.).
Balsley v. *Hetzel,* 182 Ill. App. 136 (Abst.).
Gore v. *Henrotin,* 165 Ill. App. 222, 225, 226.
Vandalia R. R. v. *Nordhaus,* 161 Ill. App. 110, 113.
City of Chicago v. *Smith,* 95 Ill. App. 335, 336, 339.

In certain cases, such as *Purinton* v. *Belt Railroad,* 204 Ill. App. 382, *Gore* v. *Henrotin,* 165 Ill. 222, *Scharfenstein* v. *Forest City Knitting Co.,* 253 Ill. App. 190, the action was brought under the State Wrongful Death Act, which requires such actions to be brought within one year. Notwithstanding that fact certain defendants in those cases were dismissed and covenants not to sue given them, and in the reviewing courts several years later, it was held that the other defendants were not discharged.

The second argument raised by defendants, that Mr. Jacobson had only authority to execute releases and had no authority to execute covenants not to sue, and therefore the covenants not to sue must be treated as releases, is absurd on its face. He had general authority "to execute and acknowledge any document or instrument whatsoever in furtherance of the collection of money due on said debentures" (R. 467-468). This language is certainly broad enough to include a covenant not to sue. Fur-

thermore, the power of attorney provided that a settlement of less than par required approval of the Executive Committee and the Executive Committee approved the matter and directed Mr. Jacobson to execute covenants not to sue (R. 244, 268, 270).

Even if there were any merit of defendants' contention that the authority contained in the powers of attorney was exceeded or improperly exercised, the only ones who could complain would be the debenture holders in whose behalf they were given. It could not possibly accord the defendants any right to claim that the instruments were not covenants not to sue and that they had been released.

The question here involved has been amply presented, considered and properly determined by both the District Court and the Circuit Court of Appeals.

Conclusion.

The defendants' cross-petition fails to furnish any reason for the review by this Court of that portion of the judgment of the Circuit Court of Appeals which is in favor of the plaintiffs. The portion of the judgment under attack is not final and this Court should not burden itself with the review of preliminary matters which may become moot before the case is ended. Moreover, the judgment is not in conflict with applicable decisions of the state and federal courts.

For all these reasons, respondents urge that the cross-petition for certiorari be denied.

Respectfully submitted,

EDMUND D. ADCOCK,
ROGER Q. WHITE,
LEWIS F. JACOBSON,
Counsel for Cross-Respondents (Plaintiffs).

No. 823

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

SAMUEL INSULL, JR., ET AL.,
Cross-Petitioners (Defendants),

vs.

THOMAS D. AIKEN, ET AL.,
Cross-Respondents (Plaintiffs).

REPLY OF CROSS-PETITIONERS (DEFENDANTS) TO BRIEF OF CROSS-RESPONDENTS (PLAINTIFFS) IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners (Defendants).

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To the Honorable the Supreme Court of the United States:

We believe the reasons for the allowance of the writ of certiorari are sufficiently set forth in our cross-petition and are not met by the brief of cross-respondents. Briefly, we desire to call special attention to the following points:

I.

This cross-petition for review is not premature. Points raised by defendants, if sustained, are decisive of the case.

It is no answer to the cross-petition for writ of certiorari to say that a review may be had of the questions presented after a trial on the merits and a decree of the District Court. (Opp. Br. pp. 1-3.) Before there can be a lawful trial there must be a complaint which states a cause of action. Why have an expensive and prolonged trial if in the end this Court will be compelled to find that plaintiffs had no right to maintain this suit? The points raised by the cross-petition, if sustained, must result in a final decree in favor of defendants. We feel confident that we are right in our contentions that plaintiffs do not state a cause of action in their complaint, and if this be true, justice requires this case be determined now.

The recent case of *City of Indianapolis, et al.* v. *Chase National Bank of the City of New York,* 62 Sup. Ct. 15; 86 Law. Ed. 27, illustrates what may happen in the instant case if the cross-petition is not granted. We think the *Indianapolis* case clearly shows that if the question of jurisdiction can be raised on the pleadings that it is to the best interest of all parties concerned that it be raised and determined at the first possible moment. If we are right in our position that this suit cannot be maintained, then instead of the granting of our cross-petition for writ of certiorari being a "piecemeal review" of this case, it provides the only means of saving the time of the courts and needless expense to the litigants by finally disposing of the case now. Review of the judgment of the Circuit Court of Appeals will prevent "further pro-

tracting the litigation" which this Court stated was the reason for granting the writ of certiorari in *Spiller* v. *A. T. & S. F. Ry. Co.*, 253 U. S. 117, 121.

II.

The complaint does not state a cause of action.

The statements of plaintiffs as to the contents of the complaint on pages 7 and 8 of their brief in opposition are not borne out by the complaint itself. There is no allegation in the complaint that on "January 1, 1930, the plaintiffs and approximately 20,000 members of the public" purchased the debentures. On the contrary it appears from the complaint that on January 1, 1930, I. U. I. authorized, executed and issued to the public certain debentures of the total principal amount of $60,000,000 and that the company received therefor the sum of $56,400,000 *from underwriters* (R. 11). It is apparent from this allegation that underwriters purchased the debentures at the time of issue and there is nowhere in the complaint any allegation as to the time when any plaintiff became the owner of a debenture.

The failure to allege in the complaint that plaintiffs were the owners of debentures at the time the alleged wrongs were committed is conclusive against the right of plaintiffs to maintain this suit. The complaint was filed February 3, 1933, and it alleges that the plaintiffs were then the owners of certain debentures (R. 19). It cannot be assumed, in the absence of an allegation in the complaint, that the plaintiffs, or any of them, owned debentures at any time other than at the date of the filing of the complaint. The complaint shows by inference at least that they bought their debentures at less than face for it says that they paid "a good and valuable considera-

tion approximately equal to the par or face value thereof." R. 19.

There is no specific allegation of any wrong having been committed by any defendant which occurred at a time when any plaintiff was the owner of a debenture. The complaint shows that plaintiffs did not buy any of the debentures directly from the company because it is alleged that the total amount of the purchase price was paid by underwriters (R. 11). Nowhere in the complaint is it shown from whom the plaintiffs bought their debentures or whether they were bought a month before or a day before the attorneys procured the names on the "Uniform Contract" forms. Even if it could be said that plaintiffs bought some debentures on the day the underwriters made the original purchase, still there is nothing in the complaint to show that the debentures they then bought were not a part of the $4,818,000 that were paid between the date of issue and the date of bringing suit. See R. 11.

Other insufficiencies of the complaint are discussed at pages 15-24 of the cross-petition. The sub-paragraphs of the brief in opposition (pp. 7-8) are not a fair summary of the allegations of the complaint.

III.

There is an absence of allegations of fact to show that the requisite jurisdictional amount is present.

The allegations of the complaint with reference to the requisite jurisdictional amount being involved are subject to the same general criticism which can rightfully be made to the entire complaint. Only general conclusions are alleged. Our cross-petition (pp. 24-25) and the cases there cited are not answered by the brief in opposi-

tion. There are no allegations from which the amount of any dividend declared and paid can be determined. The allegation that a dividend of $1.39 a share was declared (R. 34) is meaningless without an allegation as to the number of shares then outstanding. Nothing appears in any part of the complaint which discloses the amount of outstanding shares at the time this dividend is alleged to have been declared. Paragraph 15 of the complaint (R. 17) is the foundation for the statement by plaintiffs in sub-paragraph (f) on page 8 on their brief as to the number of outstanding preferred shares. Paragraph 15 does not justify sub-paragraph (f). There is no allegation in the complaint as to what shares of stock were outstanding on January 9, 1932, the date referred to in sub-paragraph (g) on page 8 of the brief in opposition. Paragraph 15 of the complaint (R. 17) refers to stock outstanding on January 1, 1930, two years before the dividend is alleged to have been declared. Nowhere does there appear in the complaint any allegation as to what stock was outstanding at the time any dividend was declared.

IV.

The District Court was correct in refusing to allow amendments to the complaint.

Under point I-A of the brief in opposition (p. 7) it is admitted that if the original complaint was so deficient that it failed to state any cause of action then there was nothing to which the amendments could attach. The original complaint must stand or fall on its own allegations. The original complaint was filed on February 3, 1933 (R. 2), and it was not until March 1, 1940, more than seven years later, that the proffered amendments were submitted (R. 298, 299). After such extended

delay the District Court certainly did not abuse its discretion in denying leave to file the amendments. The records of the company were in the hands of the trustee in bankruptcy and available to the plaintiffs throughout the years. The transactions of I. U. I. were large and numerous and extended into a period of world-wide economic collapse. Between the time the suit was commenced and the amendments were offered, Samuel Insull, a director and principal officer of the company, and John H. Gulick and Marshall E. Sampsell, two other directors, had died, and four other directors had settled their liability and been dismissed out of the suit. To ask the defendants at this late date to marshal proof to meet allegations not made until seven years after the suit was begun and nine years after the transactions challenged is not consistent with any rules of practice. The Rules of Civil Procedure, which did not become effective until September 1938, cannot help a complaint which fails to state a cause of action relating to events occurring in January 1932 and prior thereto. If the cause of action relating to alleged wrongful payment of dividends was barred by Section 15 of the Illinois Statute of Limitations, that bar became final and conclusive in 1937 or prior thereto and the rules cannot put new life into a cause of action which is dead. Under Illinois law, the Statute of Limitations is not merely a procedural bar but is a vested right which cannot be taken away. *Board of Education* v. *Blodgett*, 155 Ill. 441, 447; *Hanley* v. *Waters*, 255 Ill. App. 239, 247.

V.

On the questions of the authority to bring this suit and the selection of plaintiffs.

On the contested issue presented by the cross-petition (p. 10) as to whether the attorneys appearing for plaintiffs had authority to commence and prosecute this suit, we submit that the brief in opposition (p. 36 *et seq.*) does not make sufficient answer. The determination of this question must rest solely on a construction of the so-called "Uniform Contract with Debenture Holders" employing the attorneys (R. 467). They do not claim there is any other authority.

The complaint does not furnish any solution of the question. In its first paragraph it alleges that the plaintiffs named brought the suit. But the complaint purports to have been signed not by the plaintiffs but by one Arthur Altschul, who designates himself therein as the duly authorized agent of the plaintiffs and whose affidavit, attached to the complaint, says that he was such duly authorized agent. Altschul was not named in the "Uniform Contract" (R. 467) as having received any power and the record is devoid of any evidence of substitution under the contract.

Even if the two firms of attorneys designated in the "Uniform Contract" had attempted to bring this suit against the former directors of I. U. I. they would have had no authority so to do under the terms of the contract. Their authority was to *collect moneys due upon the debentures* (R. 467). The debentures were the creation and debt only of the corporation. They were merely promissory notes of the corporation and authority to bring suit to collect money due upon a note certainly

could not be held to authorize the bringing of a suit against a party other than one liable on the note. There was no personal liability of any director upon any debenture. In fact, there was a no-recourse clause in each debenture barring action against directors on the debentures. R. 9, 15.

The second paragraph of the "Uniform Contract" confirms the theory that the employment was intended to give power only to collect the money due on the debentures. All of the things there authorized to be done by the attorneys named was limited to the "furtherance of such collection" (R. 467). There is no intimation of any power or authorization given to the attorneys to do more than to collect the debentures or the money due thereon.

If as we earnestly contend there was no authority given by the named plaintiffs to institute this suit against the former directors, or if this suit was instituted in the name of plaintiffs without their knowledge, as the record clearly indicates (R. 469), such fact alone would be sufficient ground for the dismissal of the suit by the District Court.

What is said on page 30 of the brief in opposition does not change the facts appearing in the record showing collusion, for as we stated in our brief in support of our cross-petition (pp. 26-28) no plaintiff in this law suit gave any direction for the bringing of this particular suit or had any knowledge of its commencement until after the suit was brought (R. 469). The named plaintiffs were in fact, as designated by cross-respondents, nothing more than "straw men plucked out of the air," by the secretary of a corporation organized to conduct this litigation, in order to create a spurious diversity of citizenship in order to gain access to the Federal Court. They

were selected and hand picked by this agent of the attorneys who started this litigation, and in their selection care was taken not to pick from the list of 1500 debenture holders any who resided within the State of Illinois, although it was the intention and purpose of the attorneys who brought the suit to bring it for the benefit of residents of Illinois as well as non-residents of the State of Illinois. The interested debenture holders did not get together and decide to bring a representative suit in the name of some of their number, but persons having no legitimate interest in the litigation selected the named plaintiffs without even consulting them, much less other interested parties. The debenture holders were as pawns upon a board being moved by the attorneys who made the selection, well knowing that if all of the parties whom they represented were made parties that the United States Court would not take jurisdiction.

VI.

It was not necessary for defendants to cross-appeal.

Plaintiffs argue that because the District Court decreed that the attorneys for plaintiffs established their authority to commence the suit and because defendants did not file an appeal from that portion of the decree, the question is not reviewable by this Court (brief p. 39). The decree of the District Court was decisive and terminated and dismissed the case. This was all that the defendants could expect or desired. It is clearly settled that an appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it. (*Langnes* v. *Green*, 282 U. S. 531,

538; *Hillmer* v. *Chicago Bank of Commerce,* 375 Ill. 266, 272.) The record in the present case is entirely different from the case of *Peoria & P. U. R. Co.* v. *U. S.,* 263 U. S. 528, cited by cross-respondents on page 39 of their brief, where objection to the venue was held waived. If the attorneys for the plaintiffs had no authority to commence the suit, the plaintiffs were never, in a legal sense, in court.

VII.

The provisions of Section 23 of the Illinois Corporation Act of 1919 are violative of Section 2 of Article II and Article III of the Illinois Constitution and the Fourteenth Amendment to the Federal Constitution.

Section 23 of the 1919 act is a legislative attempt to invade the judicial field. Section 16 of the act of 1872, the former statute, was similar to Section 23 if the last paragraph of Section 23 were eliminated. The purpose of the conclusive presumption clause in the 1919 act was to change the rule of evidence applied under Section 16 of the act of 1872. To omit the conclusive presumption paragraph is to give to the statute a different effect than the legislature intended. Under the general revision of the corporate law in 1919 the legislature inserted the conclusive presumption for a purpose. There was no such presumption under the previous law and no liability existed unless the directors acted on facts actually known. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliffe Co.,* 268 Fed. 525; *Chick* v. *Fuller,* 114 Fed. 22, 29.) To sustain the 1919 act without the conclusive presumption clause is to write a law different than that intended by the legislature. Therefore, the last clause is an integral part of the statute and its provisions come within the cases cited. *Heiner* v. *Donnan,* 285 U. S. 312, 328; *Carolene Products Co.* v. *McLaughlin,* 365 Ill. 62, 70.

CONCLUSION.

We submit that plaintiffs in their brief in opposition to our cross-petition have pointed out nothing justifying its denial. We shall not here restate the various reasons why our cross-petition should be granted, but respectfully direct the Court's attention to our cross-petition and the facts therein stated which are supported by the cases there cited.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners (Defendants).

(15)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 827

STANLEY FIELD,
Petitioner,

vs.

DE MET'S INCORPORATED,
Respondent.

REPLY OF PETITIONER, STANLEY FIELD, TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DONALD F. MCPHERSON,
GEORGE RAGLAND, JR.,
Attorneys for Petitioner, Stanley Field.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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PRELIMINARY STATEMENT.

In the petition and supporting brief it was shown that the decision sought to be reviewed involves the construction of a former Illinois statute in conflict with the applicable decisions of the Supreme Court of Illinois. The District Court adopted the construction urged by the petitioner and sustained motions to dismiss the complaint. The Circuit Court of Appeals, however, reversed and remanded the cause for trial.

The respondents contend, first, that certiorari is premature in such circumstances since the judgment is not final. They assert that the cause will be heard "piecemeal" if certiorari is granted at this time. (P. 5 of respondents'

brief in the *Aiken* case which is adopted on p. 3 of respondents' brief in the instant case.) This petition for certiorari, however, was filed for the very purpose of preventing any such piecemeal hearing and of avoiding the needless expenditure of time and money incident to a lengthy trial under an improper construction of the statute. Review of the judgment of the Circuit Court of Appeals will prevent "further protracting the litigation," which this Court stated was the reason for granting the writ of certiorari in *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 121 (1920), even though the judgments of the Circuit Court of Appeals involved there were not "final" but "called for further proceedings in the trial court." (See also *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, where this Court granted certiorari to review the judgment of the Circuit Court of Appeals reversing a judgment of dismissal and ordering a remand to the District Court.)

In respect to the merits, the respondents fallaciously assume that Section 23 of the 1919 Illinois Corporation Act established liability for negligence. It did not. On the contrary, the statute established liability for active malfeasance. This basic fallacy underlies the respondents' contentions in respect to both of the essential requirements of statutory liability. (Section A as to knowledge on p. 12 of instant brief adopting I, D of *Aiken* brief and Section B as to ratification on p. 12 of instant brief adopting I, B of *Aiken* brief, which are answered on pp. 3 to 4 and 5 to 6, respectively, of this brief.) The Circuit Court of Appeals recognized that the Illinois statute did not provide liability for negligence, stating:

> "We think that the pleadings in this case, as in No. 7430, sufficiently charge the defendants with participation. Perhaps the evidence will not show this. Perhaps the evidence will show, as to one or more of the defendants, a want of control or command, an attitude of gross negligence, an irregular attendance plus perfunctory exercise of the voting power. see *Lewis* v.

Montgomery, 145 Ill. 30, 48, and *Slater* v. *Taylor,* 241 Ill. 102. Perhaps the evidence will not show this, but that is not important now." (R. 346)

The error of the Circuit Court of Appeals in the above quoted statement was in distinguishing between the evidence and the pleadings, not in failing to distinguish between negligence and malfeasance.

A.

THE ILLINOIS STATUTE REQUIRED KNOWLEDGE OF WRONGDOING AS A CONDITION PRECEDENT TO LIABILITY.

One of the principal requirements for liability under the Illinois statute is knowledge of wrongdoing. The respondents contend that "The statute says nothing about knowledge of the company's condition, so that the liability is imposed irrespective of knowledge or lack of knowledge." (P. 16 of respondents' brief in *Aiken* case which is adopted on p. 12 of respondents' brief in the instant case.) The decisions of the Supreme Court of Illinois which are referred to by the Circuit Court of Appeals in the portion of its opinion quoted above answer such a contention. Moreover, in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.,* 268 Fed. 525 (C. C. A. 7, 1920), it was held, in categorical terms, that a complaint under the Illinois statute which failed to allege that "the directors actually knew" the facts relating to the alleged impropriety should be dismissed since "such knowledge was a condition precedent to recovery." (pp. 526, 527) After stating the holding of the Supreme Court of Illinois in *Lewis* v. *Montgomery,* the Circuit Court of Appeals concluded that "We are of opinion that the words 'assenting thereto' mean a conscious approval of facts actually known." (p. 527)

The respondents contend that the 1872 Illinois statute involved in the *White* case made "assenting" to dividends a prerequisite to liability, whereas the 1919 statute here

involved imposed liability for "declaring or assenting" to dividends. (p. 12 of respondents' brief in instant case.) Significantly, however, neither the complaint nor the amendment thereto charged this petitioner, Stanley Field, with declaring dividends. The original complaint alleged that he, in common with the other directors, had "authorized or ratified" the payment of dividends. (R. 12) The amendment to the complaint alleged specifically in respect to each dividend complained of that Field "assented to the declaration of the dividend described" (in the preceding paragraph) "by voting in favor of a resolution ratifying, confirming, and approving said dividend." (R. 302-303, Pars. (f), (h), (j), (l), (n) and (p).)

Certainly the bookkeeping and accounting "irregularities", of which the respondents contend they alleged knowledge, are insufficient to impose liability under the Illinois statute. (P. 10 of respondents' brief in *Aiken* case which is adopted on p. 12 of respondents' brief in instant case, and R. 10.) The lack of "surplus" which the complaint here alleged as the sole basis for charging that the dividends were improper was expressly defined as the lack of any "actual surplus," if the company's books were changed to conform to the respondents' partisan views as to proper accounting and bookkeeping practices. (Par. 33 of Complaint (R. 12), incorporating par. 22 of Complaint (R. 10).) There is no charge that this petitioner, Stanley Field participated in the alleged bookkeeping and accounting improprieties. His relation to Corporation Securities Co. of Chicago was quite similar to that of the two directors who were freed from charges of liability under the Illinois statute in *Chick* v. *Fuller*, 114 Fed. 22 (C. C. A. 7, 1902). Field, just as were those two directors, should be exonerated as not being "purposely a party" to the transactions and practices which allegedly rendered the dividends improper. (p. 28)

B.

THE ILLINOIS STATUTE REQUIRED ASSENT IN ADVANCE OF DIVIDENDS AND RATIFICATION AFTER DIVIDENDS WAS INSUFFICIENT TO IMPOSE LIABILITY.

The respondents admit that this petitioner, Stanley Field, was not present at any of the meetings of the directors of Corporation Securities Co. of Chicago at which dividends were declared. (R. 302-303) Field is not charged with the declaration of dividends but with ratification of the dividends declared by other members of the board of directors, a so-called executive committee. Field was not one of the original directors who empowered the executive committee of the board of directors to declare dividends. The amendment to the complaint alleged that such power was given by a meeting of the board of directors held on October 8, 1929, and that Field was elected to the board of directors on June 11, 1930. (R. 305) The last paragraph of Section 23 of the 1919 Illinois Corporation Act provided that "Unless a director was absent from the meeting at which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." Although expressed in negative terms, this statutory provision effectively exempts from liability a director who was absent at the meeting at which dividends were declared. Consequently this petitioner is free from liability under the former Illinois statute.

While the respondents do not cite any Illinois decision in support of the contention, they state that courts "in other jurisdictions" have held "that ratification or approval of a dividend after it has been declared amounts to 'assent'." (P. 14 of respondents' brief in *Aiken* case which is adopted on p. 12 of respondents' brief in instant case.) The cases cited by respondents in support of this statement involve statutes which impose liability on directors for

negligence, under which ratification is sufficient. The earlier New York statute, for instance, which was involved in *Walker* v. *Man*, 253 N. Y. S. 458 (cited at p. 14 of *Aiken* brief), provided that the directors should be liable for any money or property "which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or other violation of their duties." (Quoted in 253 N. Y. S. at p. 461.)[1] Section 23 of the 1919 Illinois Corporation Act contained no such provision, and Illinois has never had any such statute.

Similarly, the Kentucky, Wisconsin and Massachusetts cases cited by the respondents involve, respectively, statutory liability of bank directors for negligence, receipt by directors of improperly declared dividends, and personal participation in the payment of dividends. Such cases have no applicability here. The cause of action relating to dividends in this case arises solely under the former Illinois statute, Section 23 of the 1919 Illinois Corporation Act, and the liability of this petitioner is governed by that statute and not by the statutes in any other States.

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[1] The Court is referred to the recent decision of the Supreme Court of New York County in *Randall* v. *Bailey*, 23 N. Y. S. (2d) 173 (1940), which was unanimously affirmed by the Appellate Division, First Department, in a memorandum decision, 29 N. Y. S. 512 (1941), and which construed a New York statute more nearly similar to Section 23 of the 1919 Illinois Corporation Act. In sustaining motions for judgment in favor of defendant directors, charged with declaring dividends which impaired capital in violation of such New York statute, the court held that the statute required "a determination of the value of the assets at each dividend declaration" and stated: "My views of the business acumen or financial sagacity of these directors, as well as my views as to what the legislature ought to permit or prohibit, are entirely immaterial. The question I have to decide is whether or not an existing statute has been violated. The problem is one of statutory construction." (pp. 179, 182)

CONCLUSION.

This petitioner respectfully urges that the petition for a writ of certiorari filed by him be granted, and that, on hearing, this Court set aside the judgment of the Circuit Court of Appeals for the Seventh Circuit in so far as it reverses the order of the District Court and affirm the decree of the District Court in all respects.

Respectfully submitted,

DONALD F. MCPHERSON,
GEORGE RAGLAND, JR.,
Attorneys for Petitioner,
Stanley Field.

SIDLEY, MCPHERSON, AUSTIN & BURGESS,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 821

THOMAS D. AIKEN, ET AL.,
Plaintiffs-Petitioners,

vs.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

REPLY BY PETITIONERS TO RESPONDENTS ANSWER TO PETITION FOR WRIT OF CERTIORARI.

EDMUND D. ADCOCK,
33 North La Salle Street,
LEWIS F. JACOBSON,
33 North La Salle Street,
ROGER Q. WHITE,
120 South La Salle Street,
Counsel for Plaintiffs-Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 821

THOMAS D. AIKEN, ET AL.,
Plaintiffs-Petitioners,

vs.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

REPLY BY PETITIONER TO RESPONDENTS ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

MAY IT PLEASE THIS HONORABLE COURT:

FOREWORD.

We humbly apologize for the length of this Reply and beg the Court to consider as extenuating circumstances: (a) the nature of the case and the responsibilities thereof, (b) respondents' distortion of the facts, issues and law necessitating an extensive reply, (c) the shortness of time for condensation, and (d) the possibility that this comprehensive treatment may serve the Court's convenience.

Respondents Attempt to Obfuscate the Facts in This Case and to Escape Equity and Justice.

The Answer of the respondents to the Petition for a Writ of Certiorari is an attempt to obliterate the simple facts in this case, and the simple common sense principles of law and equity which apply thereto.

Respondents seek to re-establish in Illinois legal legerdemain, a false and vicious doctrine of releasing people of the grossest wrongdoing, a cancerous growth, that has long ago been completely eradicated from this state and from every other enlightened jurisdiction in the United States.

The lower court failed to recognize the crucial facts and the present living law of Illinois, and also failed to recognize that *this is a suit in equity in a court of equity;* that it is an *appeal to* the *common sense* and to the conscience of a Court of Equity by over seventeen thousand defrauded debenture holders all over the United States, who *seek equitable relief* and redress, for losses they sustained through the wrongdoings of the respondents, directors in Insull Utility Investments, Inc.

Respondents accuse all the debenture holders of having "released" respondent directors of all rights of action for accounting.

This accusation is supported only by,—(a) distorting and befogging the admitted facts in this case, and (b) by applying legal legerdemain. They now spuriously contend that in some *unintented* or "meaningless" manner a "release" was accomplished for such wrongdoers.

On the facts, our simple answer is:

No such thing happened,—

There was no release of the directors of I. U. I. The transaction with the banks did not release anybody. It only restrained the debenture holders from suing the banks

further, which was in the nature of an effective covenant not to sue.

There was neither intent nor motive in any one of the thousands of investors who lost all their money to release the directors and thereby throw away any or every opportunity to recover all that was possible from any and every wrongdoer who caused them $53,000,000 in loss.

The intention was exactly to the contrary.

Respondents' assertion is preposterous. *It is exactly contrary to the truth* and understanding of the parties, and to their own agreement with the banks *not* to release the directors of I. U. I.

THE FACTS.

To clarify the situation, we briefly review, summarize and comment on the salient admitted facts in this case.

The facts in this case consist of the allegations in the *Bill of Complaint,* and in the statements and averments of fact contained in the *"Answer on the Facts"* (R. 229-268) filed by the petitioners (plaintiffs) in opposition to the Motion for Summary Judgment and *the evidence,* relating to the agreement of settlement and all the other written and oral evidence stated and referred to in such Answer, which plaintiffs offered to introduce (R. 230-231, 239, 264).

The plaintiffs (petitioners herein), offered to produce in Court all of the evidence, written, oral and documentary, and the persons having personal knowledge of the facts to prove every allegation in the Bill of Complaint and in the Answer on the Facts (R. 239).

At the hearing of the Motion for Summary Judgment, when plaintiffs again requested an opportunity to introduce the evidence, Mr. Thompson, attorney for respondents said (R. 279):

> "I have just filed a motion (to strike plaintiffs' Answer on the Facts) eliminating all questions of fact, because, we in that motion, in effect admit the facts alleged or averred." * * * (R. 288.) * * * "We demurred to it, and we filed a motion to strike it. There is no dispute of those facts."

The Court rejected all of this evidence as immaterial (R. 288, 289) and incompetent (R. 290, 291).

From the admitted facts in the record it therefore appears, without any dispute:

DEBENTURE HOLDERS DID NOT RELEASE OR INTEND TO RELEASE RESPONDENTS.

1. *No debenture holder* (or representative of such debenture holder) *ever signed a release to anybody for anything.* (R. 237, pars. 47, 48-49; R. 241, par. 60.)

2. Judge Wilkerson, the banks and the debenture holders **intended not to release or affect any causes** of action against the respondents, but expressly reserved them.

3. *No debenture holder* (or representative) *ever signed, executed or delivered any release, acquittance, covenant, accord, satisfaction or other document or paper* in connection with the bank settlement.* (R. 241-60, Offer of Proof; R. 239, par. 56.)

4. The *terms and conditions* of settlement, set out in the statement sent to debenture holders included the Reservation of all rights of action against the respondent directors (R. 159, Clause K), as follows:

Reservation.

> "(K) Nothing in the settlement shall be construed to *operate as a release or to effect any claims* against any person, firm or corporation other than a party to said settlement by name or reference and any officer, director, agent or employe of such party who is not or has not also been an officer or director of said Insull Utility Investments, Inc."

* Except, that over 51% of the debenture holders signed a form of Acceptance (R. 153; 170, par. 33) of the proposed bank settlement, after receiving from the Receiver appointed by the Court, a Notice and statement (R. 155-162) of the *terms and conditions* of such proposed settlement.

No Intention to Release Anybody.

5. **There never was any intention in fact by any debenture holder—to release the respondent directors** or the banks, or anybody of anything. (R. 241, par. 60; R. 230-268, Plaintiffs' Answer on the Facts to Motion for Summary Judgment; R. 237, par. 47-49; Offer of Proof, R. 239, par. 56.)

The Reservation Was a Condition of the Settlement. It Was Relied on by Debenture Holders.

6. **The Reservation** of all actions against the directors of I. U. I. **was an integral part and condition** upon which the bank settlement was made. (R. 238, par. 52; Offer of Proof, R. 239, par. 56.)

7. **The Reservation was relied on by** plaintiffs (petitioners here), and **all other debenture holders,** and **but for such reservation no settlement would have been made.** (R. 238, par. 3; R. 230-268; Offer of Proof, R. 239, par. 56.)

Respondents Admit That Debenture Holders Did Not Intend to Release the Directors.

8. Respondents *admitted* (R. 289):

> "Mr. Thompson (Attorney for Respondents): We admit that they did not intend to release the cause of action against the directors."

9. **There was no release or accord and satisfaction** of any cause of action set forth in the **complaint in this suit,** (R. 230), sub-par. (e), and then pending and active in the same U. S. District Court (R. 59-62), where the bank settlement proceeding was pending (R. 86-148).

Debenture Holders Recovered Only 7½% of Their Losses.

10. The plaintiffs (petitioners) and the other 17,000 *debenture holders recovered only 3½ cents* on the dollar through dividends in bankruptcy *and 4 cents* from a fund raised by the settling banks. They recovered nothing else. They lost over $53,000,000. (R. 239, par. 57; R. 241, par. 241; R. 230-268.)

THE ACTUAL AGREEMENT OF SETTLEMENT WITH THE BANKS MADE BY THE PARTIES DID NOT INTEND TO RELEASE THE DIRECTORS, BUT INTENDED TO RESERVE ALL ACTIONS AGAINST THE DIRECTORS.

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11. **The agreement of settlement was partly written and partly oral.** The Decree of Judge Wilkerson was only one step in its Performance. The *Agreement* is set forth more fully in Answer on the Facts (R. 235-268; the offer of proof, oral and written, concerning it appears in R. 239, par. 56). The agreement is described: (a) In the Petition for Decretal Order Approving Settlement and Compromise, Etc., filed August 13, 1937 (R. 115-148, at pages 137-145, Par. 26, A to L, the reservation is Clause K thereof, and appears at p. 143); (b) in the Order of Court entered on such Petition (R. 148-162), which incorporates the Notice to be given to all debenture holders (R. 157-162). (c) The substance of the Agreement is described in R. 157, *et seq.*, and the reservation Clause K as set out in said notice appears at R. 159. This reservation appears in our statement of facts, *supra.* (d) The Agreement also is set out in the Findings of Fact made by Judge Wilkerson (R. 166-170), including the reservation Clause K at page 166; the agreement is also referred to in the Decree

made by Judge Wilkerson (R. 172-174), which refers to the "compromise and settlement agreement set forth in Paragraph 26 of said Petition" (of which Clause K is a part). The evidence submitted was referred to by Judge Wilkerson in his Decree of Settlement (R. 172).

12. **The Agreement of Settlement was the result of negotiations** which lasted over one year. There were many specified suits, many parties, many phases, many claims and many conditions to be considered, agreed upon, arranged for and disposed of (R. 136, 137, Par. 25, 26, R. 115, 145).

BANKS INTENDED TO BUY PEACE ONLY FOR THEMSELVES.

13. The **intent and purpose of the banks** who were parties to agreement was, that, although they believed that they were blameless, they wished and **intended to buy their peace** (R. 236, par. 42), and desired to obtain something **in the nature of a covenant not to sue** (R. 233-239), namely, an order, injunction or decree of some court (R. 233), (R. 172, 177) **to bar and restrain the further prosecution of any litigation with such banks only**, (in the hope that such injunction would be practically so effective), against all the 17,000 debenture holders; most of whom were not even represented in that court. (Only $10,000,000 approximately out of the $57,000,000 were represented in court by various committees (R. 127).) It was difficult or impossible to reach all of them and obtain formal covenants not to sue from all of them.

17,000 Debenture Holders Never Heard of Any Intent to Release the Directors,—But They Heard Exactly to the Contrary.

14. **None of the 17,000 debenture holders** (as appears from the record) **ever heard of any intent** or purpose **to release the directors. They were informed just to the contrary.** The first notice to the debenture holders all over the United States appears in the notice issued by the receiver pursuant to the order of court (R. 155-162). More than 23,000 printed notices were mailed under the direction of the Receiver (R. 169, Par. 29). This **notice described the settlement agreement and the reservation** clause referred to.

Letter of Explanation to Debenture Holders—All Suits Against Directors to Proceed.

15. On August 31, 1937, when the Petition for Decretal Order to Approve the Settlement with the banks was filed in Court, and before the settlement with the banks was consummated by a decree, the Insull Protective Committee caused to be mailed to each of its members, over 1400, a letter (R. 238, Par. 54) which is as follows:

(Letter Head of Committee.)

"SUIT AGAINST DIRECTORS AND PARTIAL RECOVERY TO DATE."

"2. In addition to the above litigation, (proposed to be settled against the banks), *our counsel have also been prosecuting a suit against the directors of Insull Utilities Investments, Inc.*, for wrongful declaration of dividends, *breach of debenture covenants*, waste, etc. *This suit is not affected by the settlement* described in Paragraph 1 (of this letter). * * * *Our counsel* * * * *are prosecuting the suit against the other nine directors.*" (R. 268-269.) (Interpolations are ours.)

NEITHER JUDGE WILKERSON OR HIS DECREE RELEASED OR INTENDED TO RELEASE THE DIRECTORS.

16. Judge Wilkerson conducted the bank settlement proceedings and made the Decree in that case (R. 172, 174), and in the Bankruptcy case (R. 195). Acting as such court, he:

(a) made **Findings** that the (parol) **agreement of settlement** (which was submitted to the Court (R. 172)), (R. 137, par. 26 to page 145), set forth in the Petition for a Decretal Order to Approve the Settlement (R. 115-148) **including the Reservation Clause K** (R. 166) "was fair, just and equitable" (R. 170, par. 34).

(b) The Court decreed (based on the *evidence then submitted to* him), that "the **settlement agreement** set forth in Paragraph 26 of the Petition" (for Decretal Order), **which includes Clause K as part thereof,** (R. 137, Par. 26, Clause K at page 143), is fair, just and equitable, and

"the complainants (*Kelly, et al.* v. *Banks*), as representatives of the class (for all debenture holders, interpolations are ours), * * * are hereby authorized and directed to enter into and make said settlement and compromise **on the terms set forth in said petition and to carry said agreement for settlement and compromise** into effect, and **to perform the terms and conditions thereof,**" * * * etc.

(c) The Court then decreed an INJUNCTION.

"Until the further order of this Court **all holders and owners** of said Series A and Series B Debentures of Insull Utility Investments, Inc. and said Bigelow, as Trustee, **are hereby enjoined and restrained from instituting or prosecuting any suits at law or in equity against** * * * (named banks)

"and the claims of such Debenture holders **against said Banks**, are limited to said settlement fund, and

upon the payment by said Banks of said settlement fund to said Receiver, all such **holders and owners of said Debentures** and said Bigelow, as Trustee, **are hereby permanently enjoined and restrained from instituting or prosecuting any such suits at law or in equity.**" (Against such banks. Interpolations are ours).

NOT A WORD IN COURT PAPERS TO JUSTIFY CONTENTION THAT A RELEASE OF DIRECTORS WAS DECREED OR INTENDED.

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17. *There is not one word in the entire settlement proceeding* to indicate the slightest intention to release any director from anything. Even counsel for respondents admitted in the District Court (R. 289):

> "The Court: Your position is that these facts (contained in the Answer on the Facts, R. 230-268) are unimportant?
>
> "Mr. Thompson: Yes, we have demurred to that Answer, so the question stands here with those facts admitted for whatever they are worth. We admit they did not intend to release the cause of action against the directors, and in accordance to what they say there they didn't * * *."

In this Court, counsel for respondents, in their Answer to Petition for Writ of Certiorari, say at page 7, point 7:

> "It is immaterial that the settling debenture holders who petitioned for the decree intended to release only the banks."

There is not one word in the Petition for Decretal Order Approving Settlement with the Banks filed August 13, 1937 (R. 115); in the Order to notify the creditors of the proposed settlement (R. 148); in the Notice directed to be sent to the debenture holders by the court (R. 155); in

the Answer filed October 20, 1937 by the Continental Bank and other banks, defendants in the litigation settled (R. 162); in the Findings of Fact and conclusions of law entered by Judge Wilkerson on November 4, 1937 (R. 166); in the Decree aproving the settlement entered by Judge Wilkerson on November 4, 1937 (R. 172); or in *any other Order* confirming the settlement, to the effect that the directors were intended or should be in any manner released. There is not a single expression in the entire Petition for Decretal Order approving the settlement that even hints that the plaintiffs (petitioners) contracted with any other person *except the banks* to refrain from further prosecuting anybody *but* the banks, Judge Briggle to the contrary (R. 293) notwithstanding.

RESERVATION OF ALL RIGHTS OF ACTION IS CLEARLY INTENDED, AGREED TO AND EXPRESSED IN COURT DOCUMENTS AND DECREE.

18. On the contrary, the **reservation of the rights of all causes of action,** claims or demands **against the directors was fully set out in the Petition for Decretal Order** (Clause K, R. 143). It was fully **described in the Notice** given to the debenture holders, (Clause K, R. 159). It was fully set out in the **Findings of Fact** made by Judge Wilkerson (R. 211) and was referred to in the **Decree and Order confirming** the Settlement dated February 24, 1938 (R. 174).

Decree of Judge Wilkerson Did Not Order Debenture Holders to Execute a Release or to Release Anybody of Anything. It Only Enjoined Further Suits.

19. If Judge Wilkerson or the District Court in the bank proceeding intended to release the directors from any cause of action he **would** have so provided in his decree. He provided **exactly to the contrary.**

20. The District Court in 1937, in the bank settlement proceeding or decree **did not order or direct the debenture holders to do anything**, except to refrain from suing the banks further.

The Respondent Directors Knew That They Were Not Released or Intended to Be Released. They Cannot Complain of the Decree or Its Intent to Carry Out the Settlement Agreement Made by the Parties.

22. They knew the settlement agreement was being made and refused to participate in it (R. 230-241).

Respondents did attempt to get the benefit of the negotiations for settlement with the banks, but their proposals were rejected because they did not add substantially to the fund (R. 236-237, 242).

The notices of the hearing of the proposed bank settlement were widely published in newspapers. Evidence was taken before Judge Wilkerson concerning the settlement agreement and the decree so recites (R. 172).

They did not complain—no one filed objections to the decree (R. 172). They sat by. (*Mo. Pac. R. R. Co.* v. *Texas & Pac. Ry. Co.*, 282 Fed. 61.)

This estops them from complaining. *Oliver* v. *Ross*, 289 Ill. 624, 640 (Floyd E. Thompson, Judge). Such silence has a fraudulent effect on the debenture holders. *Milligan* v. *Miller*, 253 Ill. 511.

Judge Briggle Acted Erroneously in Granting Summary Judgment.

March 8, 1940, Judge Briggle entered the erroneous judgment appealed from on a motion for summary judgment. (R. 320).

He erroneously overruled the objections of plaintiffs (petitioners) to the motion for summary judgment and to proceeding under Rule 56, and struck the Answer on the Facts which they filed in opposition to such motion (R. 224-268), and denied a trial by jury, which had been demanded (R. 277). He rejected and refused to hear proper, uncontradicted, evidence then offered, and also presented in the Answer on the Facts, filed by plaintiffs (petitioners), which would have dispelled any doubts concerning (a) the decree, (b) the reservation of causes of action therein, and (c) the reservation that the respondents were not to be released or affected, and (d) concerning the bank settlement proceeding, and (e) the intent, purpose, meaning, understanding and (f) the agreement of the banks and the debenture holders which was effectuated by such decree.

The District Court's holding was exactly contrary to the language of the reservation, and exactly contrary to the evidence of the actual and admitted intent of all the parties to the agreement, and to the intent and purpose of the agreement itself, and contrary to the intent and purpose of the court proceedings, and to the intent and purpose of the consent decree of Judge Wilkerson in the bank settlement proceeding.

The District Court read *into* Judge Wilkerson's decree something which it expressly provided *against* in that decree.

The lower court erroneously *rejected* as "incompetent"

(R. 290, last line, and R. 291), all *evidence written and oral of all the parties to the transaction* (R. 230-268):

(a) Of the *entire agreement* of settlement (of which the *decree* was *only a part*), and the evidence concerning it submitted to Judge Wilkerson, and which he referred to in his decree;

(b) *concerning the intent* of all such parties not to release any director;

(c) their *meaning and understanding* of the *reservation* they made not to release or affect the liabilities of the wrong-doing directors, and

(d) the *circumstances surrounding* the transaction, the situation of the parties, their purpose and meaning, and

(e) the *interpretation and performance* of the parties themselves, under such arrangement,

all of which are vital in construing any agreement in equity, as well as in law.

District Court Erroneously Interpolated New Terms Into the Decree—Contrary to the Uncontradicted Evidence as to the Actual Agreement of the Parties.

Thereupon the District Court, in this case, after making the completely unwarranted assertions about the agreement, the petition and the intent of the parties which were exactly contary to the facts, and exactly contrary to the admissions of the attorney for the respondents made to him in open court (please see *supra*, and R. 289), Judge Briggle then interpolated his *own language* into the Reservation (which we quote, *supra*), and which was made in the settlement agreement, also in the Petition for Decretal Order and in the Findings of Fact and on which the decree was entered by the consent of all the parties to the transaction in the bank settlement case.

Judge Briggle interpolated and added to the Reservation the following words: "*but (the agreement) is to be con-*

strued as a release and settlement of the cause of action against the parties hereto." (R. 293).

With such spurious addition, the lower court in this case held that the reservation (of the causes of action against the respondent directors), became "meaningless and repugnant."

The **reservation was a condition** precedent to the settlement. It meant the possible recovery of $53,000,000 against the directors for their wrongdoings. **But for such reservation the settlement would not have been made by the debenture holders.** But for such reservation **the settlement** with the banks **would not have been "fair, just or equitable"** as found by Judge Wilkerson. **The debenture holders relied on such reservation.** The reservation **was not repugnant to them.** It was **vital to them** to have such reservation made.

17,000 debenture holders who lost $53,000,000 relied on it and acted under it.

We do not concede that the Reservation (Clause K.) is in any wise doubtful or meaningless to the parties to that arrangement or to Judge Wilkerson who found as a fact what the agreement and reservation therein were, and entered a decree in accordance therewith, and approved both the agreement and the reservation as "fair, just and equitable."

PREPOSTEROUS TO BELIEVE THAT THE DEBENTURE HOLDERS INTENDED TO THROW AWAY MOST IMPORTANT RIGHTS.

It is just *plain common sense* to realize that the intent of the losers of $53,000,000 was *not to release* any wrongdoers until every possible *effort was exhausted* to bring to justice every wrongdoer who caused them to lose their money, and to obtain relief. Such litigation was then pend-

ing against the respondent directors when the bank settlement was made in 1937.

It is wholly improper to assume that Judge Wilkerson would have found as a fact or approved anything to be "fair, just and equitable," if he did not understand the meaning of either the agreement or of the reservation.

It is wholly improper to assume (as did Judge Briggle) that if the intent of the parties was *not* to prosecute the directors further—then he, Judge Wilkerson, would have ordered to be dismissed this very suit that was then pending and active in his Court.

History of I. U. I. and Relations Assumed by Directors to the Public Whose Trust They Induced.

To clarify other essential facts as bearing on the nature of respondent's liabilities, (and to correct the inaccurate and misleading statements in respondents' Answer and brief), we briefly submit the following uncontroverted facts, (Parenthetical interpolations are ours):

I. U. I. Sold Debentures to Public Immediately Upon Incorporation, $66,000,000 Total Within One Year.

The facts stated in the complaint (R. 2-39), and admitted to be true, (R. 289), are that Insull Utility Investments, Inc. was incorporated December 27, 1928 by Samuel Insull and his close associates, who were the respondents and the other directors (R. 3, par. 5). About January 1, 1929 (within 4 days) there were issued $6,000,000 Series A Debentures (R. 6, par. 11).

January 11, 1929 (14 days after incorporation) the Series A Debentures was duly authorized and directed by the respondents to be sold to investors (R. 6, par. 11-12).

About January 1, 1930, a year later, the respondents authorized and the company issued and sold $60,000,000

Series B Debentures (R. 11, par. 12-13) making a total of $66,000,000. (Some debenture holders exercised stock conversion warrants, reducing the total outstanding to approximately $57,000,000. Nothing was recovered for stockholders in the bankruptcy.)

Respondents Represented I. U. I. to Be an Unusual Investment Trust Type to Permanently Hold and Control the Selected Insull Stocks.

When Insull Utility Investments, Inc. was organized, its *real objects and permanent policy* was proclaimed by Insull, with the knowledge of respondent directors (R. 3, par. 5) * * *

"* * * In the interest of the various properties, there should be some rallying point (Insull control) ownership and friendship (R. 3, par. 5). * * * *An investment company, to buy and hold* securities of several companies with which my name is associated * * * (R. 4).

"* * * I wanted it *for all time* to be interested in the properties that it has been my privilege either to create, improve or develop * * * and I thought I could trust its Board of Directors * * *" (R. 4, par. 2).

"* * * more than 90% of their holdings are in the 5 major Insull group utilities * * *" (R. 4, par. 3).

"*The company is fundamentally an investment company and not a trading company.* It has an *unusual status in the investment field* (R. 4, par. 4).

It is perhaps the only corporation of its kind which has *holdings almost entirely limited* to properties under the direction and management of its own directors * * * (R. 4, par. 4).

Respondents and Other Directors, in Effect, Held Themselves Out as Trustees for the Security of Investors. They Pledged Their Personal Interest as Financiers and as Trusted Operators and Managers to Protect the Debentures Whose Purchase They Induced.

The directors were publicly represented (with their knowledge and approval), (R. 3-5, par. 5-7), as closely associated in the management, operation or financing who could be *trusted with the name "Insull"* (R. 4, par. 2).

> "The directors (respondents), are men who know the earning value of the securities (I. U. I.) they *buy for investment* * * * (R. 4, par. 4).
>
> "* * * The men who have made successes of the Insull properties are the *very men who are responsible for the management of* * * * (I. U. I.) (R. 4, par. 4).
>
> "The *men who control these investments* (of I. U. I.) have large personal financial interests and have pledged their experience and ability as *financiers, managers and operators*" etc. (R. 5).

Respondents Induced the Public to Invest $66,000,000 in Safe and Secured Debentures (Bonds).

The respondents and other directors of Insull Utility Investments, Inc. induced over 20,000 people all over the United States to invest in $66,000,000 of Debentures (R. 91, par. 10) on representations (by over a million Circular Prospectuses, newspaper advertisements in over 300 cities, and by brokers and solicitors) (R. 256, 257), that these debentures or bonds were safe (R. 258, par. 121), that over $160,000,000 of assets were security and were safeguarded by respondents and the other directors whose names were put in bold type in the circulars (R. 258, par. 121).

The circulars and advertisements (R. 91-93) made no mention of a "No Recourse" escape for directors who violated the debenture covenants (R. 256-260).

The no recourse clause was buried in indistinguishable fine print in a huge debenture, 15 x 22, embellished with scrolls, insignia, seals and "GOLD" letters written 2½ inches high over it, to look like a bond and was folded and refolded to expose only 1/9th of its surface. None of these debenture certificates was delivered until many months after the investor had parted with his money. Debenture holders knew nothing about such "No Recourse" clauses (R. 258-259).

The debentures, also as advertised, contained various *protective covenants against pledging* the assets, increasing the debts, and limiting the payment of dividends (R. 12-15).

Respondents Wrongfully Pledged All the Assets, and Debenture Holders Lost Practically All.

The same respondents and directors soon thereafter, in violation of the covenants, *engaged in a series of wrongdoings, including the pledging of practically all of the* assets of I. U. I. for forbidden loans (R. 24, 32-33), and thereby such assets worth over $193,000,000 were lost (R. 32, par. 31).

Loans Not in Usual Course for Less Than One Year.

The company had no usual course of business which required borrowing large sums (R. 33, par. 38) and no usual course of business (*not a trading company* (R. 4)), (Respondent's answer here to the contrary, notwithstanding), which would enable it to pay off large loans; the loans made were not in the usual course of business (R. 33, par. 38).

The loans made from the banks were not for periods of less than one year (R. 33, par. 39, R. 24-32). None of

the pledges were made to secure the purchase price of property so pledged (R. 32, par. 33).

What followed in 1932, was bankruptcy of the company and total loss for the debenture holders except a dividend of 3½%.

Over fifteen thousand debenture holders *filed their claims and debentures* in the bankruptcy court proceeding within 6 months in 1933 as required by the bankruptcy court (R. 240). *That is the last they saw of the debentures.* They made no indorsements on them.

Paper Claims Worthless.

The withdrawn claims for deficiencies by the banks, and the other huge paper claims so quickly erased from the bankruptcy court—were mainly by *I. U. I.* v. *Corp. Sec.* and vice versa, (Middle West and other dead corporations), and other claims which it was considered a waste of time and effort to do anything else but erase. There is no evidence in the record that any bank paid 1¢ to have any such claim withdrawn, or that any debenture holder received 1¢ compensation out of it for his losses.

Duty of Judge Briggle to Protect Agreement of 17,000 Debenture Holders, Wards of the Court.

If anything in any document or decree was "meaningless" to Judge Briggle, in 1940, it was his duty as a *chancellor* to protect the important rights of so many thousands of people, in and out of court, by giving them the opportunity they demanded to submit evidence which they offered. It was his duty to obtain and receive all pertinent evidence which might explain and sustain if possible the agreement for the settlement, the decree of Judge Wilkerson and the reservation he made, as meaningful and effective.

* * * * *

The Bank Settlement Was Conditioned on the Reservation.

From the foregoing analysis it conclusively appears that the settlement was contingent on the preservation of the liability of the defendant-directors; that this condition was an inducement for the acceptance of the settlement by the debenture holders and for its approval by the court; that it is absurd to assume that Judge Wilkerson and the settling parties intended to rely on a meaningless reservation; that it is apparent that Judge Wilkerson and the settling parties treated it as valid and effective, that is, that under the established law of Illinois the agreement for settlement, the petition, findings and reservation and decree of injunction restraining suits against the parties accomplished at most what an ordinary covenant not to sue could accomplish—never a release. (The authorities are cited and discussed later.)

LOWER COURTS MISAPPLIED LAW OF ILLINOIS BUT IT APPLIED UNJUST, HARSH AND DISCARDED ANCIENT COMMON LAW TECHNICALITIES.

The District Court disregarded the fact that this was a *cause in equity*, before *a court of equity*, and by applying *harsh, unjust, unsound and ancient common law technical rules* erroneously held that the debenture holders had released the respondents of all liability for their wrongdoing and of all the losses they caused.

The Circuit Court of Appeals (although admitting this ancient common law rule to be "*harsh*" and "*technical*"), misapprehended the principles of law and equity prevailing in the State of Illinois, and affirmed the judgment.

Respondents' Acts Were Deliberate and Gross Injury to Debenture Holders.

Defendants suggest, page 34, that in causing the wrongful pledges to be made, there was a complete absence of motive for wrongdoing. There is no evidence in the record to show the faintest tinge of innocence or good faith. Well, why did they not in six years answer the complaint and submit to a trial on the merits, where the deliberate and malicious character of their wrongdoing as charged in the complaint could be proven as charged? While debenture holders were engaged in years of litigation against gigantic corporations (R. 309; Answer on Facts 229-268) defendants in this case engaged in multitudinous defensive obstructive delaying and harrassing tactics (R. 43, 46, 56, 57, 59, 60-62, 66-206). But they *never* answered the charges of the Bill of Complaint. They never submitted to a trial on the merits.

On the contrary, having admitted the charges in the complaint, it does convincingly appear in the Record (R. 2-39) that they used practically all the assets of the company to make personal profits, to engage in marketing operations, to rigging, switching or pledging assets, to pay dividends improperly, to deliberately squander and dissipate the assets on their own schemes and on the schemes of their mighty associate who fled this country when the bubble burst. (Reports of Senate Committee *re* "Insull", 1933-1934.)

The Summary Judgment brought escape to the respondents for their wrongdoing, and an unearned windfall from the Court,—a result contrary to every principle of justice and equity.

In a court of equity respondents should not be permitted to escape so gross a betrayal of trust.

The result just doesn't make common sense.

EQUITY AND LAW.

I.

THE LOWER COURT HAS MISAPPREHENDED AND MISAPPLIED THE CONTROLLING PRINCIPLES OF LAW AND THE FUNDAMENTAL DOCTRINES OF EQUITY AS THEY ARE ESTABLISHED IN ILLINOIS.

In Illinois the following principles have been established:

(a) Courts of equity will do equity and justice according to common sense and fair dealing. They will disregard super-critical, harsh and unjust technicalities and artifices which are contrary to justice.

(b) Equity looks to the substance and not the form.

(c) The intent of the parties to the entire transaction and the entire agreement must control all papers, documents, deeds, conveyances, decrees (and especially consent decrees), which were a part thereof.

(d) It is reversible error to refuse evidence, written or oral, of the circumstances surrounding the entire transaction and of the intent, meaning and understanding of the parties to such transaction and their own interpretation and performance under it, so that the true meaning and intent shall always prevail.

Wigmore on Evidence (3rd Ed.) pp. 97-99 "Integration," Secs. 2430, 2431.

Guhl v. *Guhl*, 376 Ill. 127, 133.

Ludeke v. *Sutherland*, 87 Ill. 481, 482.

Todd v. *Todd*, 159 Ill. 408.

Trapp v. *Gordon*, 366 Ill. 102, 110.

Collins v. *Phillips*, 259 Ill. 405, 411.

Scholbe v. *Schuchart*, 292 Ill. 529, 534.

Chicago Daily News Co. v. *Kohler,* 360 Ill. 351, 364.
Air Conditioning Co. v. *Honaker,* 296 Ill. App. 221, 225.
Reams v. *Janoski,* 268 Ill. App. 8.
Lane & Co. v. *Western Union Telegraph Co.,* 149 Ill. App. 562, 10 R. C. L. p. 1020.
Smith v. *Mayfield,* 163 Ill. 447, 456.
Fuchs v. *Lange & Kittredge,* 242 Ill. 88, 94.
Hedrick v. *Donovan,* 248 Ill. 479.
Haslinger v. *Gabel,* 344 Ill. 354, 367.
McAndrews v. *Mechan. Co.,* 367 Ill. 288, 297.
Vermont Marble Co. v. *Bayne,* 356 Ill. 127.
Koelmel v. *Kaelin,* 374 Ill. 204, 210 (1940).
Platt v. *Aetna Ins. Co.,* 163 Ill. 113.
Gray v. *Schoonmaker,* 30 Fed. Supp. 1019 (1940).
Gordon v. *Brucker,* 208 Ill. App. 208.
Restatement on Contracts, Sec. 208.

In *Todd* v. *Todd,* 159 Ill. 408, a written *release* and an oral understanding concerning the entire transaction was involved.

The court reviewed the evidence and at page 413 said:

> "The decision of the case must turn upon the question of *contract between the parties, independently of the release* (and conveyance). And in this connection we do not regard the point well taken by appellant that what was said and done antecedent to this release rested in negotiation and treaty only, and that the *release and deed must alone be looked to* to *ascertain the contract* between the parties. * * *"

At page 115, the Court said:

> "The written release does not *purport to* be the contract of settlement between the parties. *The contract vested in parol,* and the purpose of the release was to carry into effect *a part of the unwritten contract.*"

And also, the Court said:

> *"It could not,* therefore, be said that the verbal contract between the parties was *merged in the written one,* and that the writing must be looked to as the only evidence of the real contract between the parties. 1 Greenleaf on Evidence, sec. 284; *Platt* v. *Aetna Ins. Co.,* 153 Ill. 113, and cases there cited."
>
> (This case has been followed in every similar Illinois case thereafter.)

In *Trapp* v. *Gordon,* 366 Ill. 102, defendants (purchasers of a part of a tract of land), claimed an *oral agreement* for a perpetual easement 30 foot concrete road, underground service conduits for telephone, light, gas and sewers, etc., *despite terms of sealed instruments* (deeds, conveyances and documents in connection with the transaction), which *disclosed nothing* concerning it. The *deeds limited* the property conveyed by meets and bounds and *expressly omitted* any reference to the perpetual easement.

The Supreme Court reversed this case to require evidence of the entire oral agreement, which it held controlled all the sealed documents, which were part, and the Court said (page 113):

> "* * * the chancellor erred, however, in refusing to allow proof tendered in support of the perpetual easement of a right of way to be introduced in evidence * * * the cause is remanded with directions to accept this proof."

The principle of the case was shown at pages 110-111, where the Court (among other things) said:

> "They (the various transactions, deeds and oral agreements for the easement), were contemporaneous, in that *they were all component parts of and grew out of the same transaction or series of transactions.* While it is the general rule that all prior verbal understandings or agreements with reference to the subject matter become merged in a deed upon its acceptance and the deed constitutes the only contract between the parties which binds them (*Snyder* v.

Griswold, 37 Ill. 216; *Ely* v. *Ely*, 80 id. 532; *Weber* v. *Aluminum Ore Co.*, 304 id. 273); *yet this rule, like many other rules* in the field of law, *is subject to exceptions and qualifications. Where the (oral) contract provides for other acts besides the conveyance, the contract remains in force after the delivery of the deed until it has been fully performed* (*Biewer* v. *Mueller*, 254 Ill. 315; *Platt* v. *Aetna Ins. Co.*, 153 id. 113; *Ludeke* v. *Sutherland*, 87 id. 481)."

And at page 111 the Court said:

"*This is a suit in equity, and courts of equity look to the substance rather than to the form of written instruments, and seek to discover and carry into effect the real intention of the parties,* gleaned * * * from their * * * acts and conduct with reference thereto (*Ogden* v. *Stevens*, 241 Ill. 556)."

In *Vermont Marble Co.* v. *Bayne*, 356 Ill. 127, one of the defendants asserted that the writing he signed using expressly the words: "I hereby *agree to guarantee the amount,*" etc., was indeed a guaranty, and that he was later discharged therefrom.

The Court held (page 133) that although upon its face it was only a guaranty—still the facts and circumstances surrounding the transaction could not be ignored, and

"the promise in which the words appears *is to be construed in the light of the evidence as a whole,*" (citing cases).

That notwithstanding the use of the word "guarantee" (the agreement) must be construed to make him a surety. *The question is one of intention and depends upon the circumstances.* * * *

And at page 134 the Court said:

"Where parties *have adopted a particular construction of doubtful terms* or conditions of a contract this court will follow the construction such parties have themselves placed upon it." *McLean County Coal Co.* v. *City of Bloomington*, 234 Ill. 90.

In *MacAndrews & F. Co.* v. *Mechan. Co.*, 367 Ill. 288 (1937), defendant contended that the final letter of September 19th, and the acceptance thereof did not expressly warrant operation of the machine.

The Court however held that all of the correspondence between the parties and all of the evidence of the surrounding circumstances, objects and purposes involved in the transaction were proper evidence from which it might include in the contract an express warranty.

Recovery was sustained upon such express warranty and the Court at page 297, said:

> "The intention of the parties is to be determined from the language employed, *when read in the light of the context of the instrument and such surrounding circumstances as will aid the court in arriving at the true meaning of the parties.* (*Geithman* v. *Eichler*, 265 Ill. 579; *Goodwillie Co.* v. *Commonwealth Electric Co.*, 241 id. 42; *Druecker* v. *McLaughlin*, 235 id. 367.) In *case of ambiguity we may look to the interpretation which the parties themselves have placed upon the agreement for assistance in determining its true meaning.* (*Storey* v. *Storey*, 125 Ill. 608; *Vermont Street M.E. Church* v. *Brose*, 104 id. 206.) It is also the rule that, where a contract refers to another instrument or to a certain part thereof by specific designation, it is proper that the court know what such provision of the other instrument is."

At page 300 the Court further said:

> "It is a general rule, in the construction of contracts, *that the writing is to be interpreted as a whole,* and *all writings forming a part of the same transaction* are *interpreted together.* * * * (*Chicago Auditorium Ass'n* v. *Fine Arts Building*, 244 Ill. 532; *Geithman* v. *Eichler, supra;* Restatement Law of Contracts, secs. 230-235.)"

In *Platt* v. *Aetna Ins. Co.*, 153 Ill. 113, the Court, in commenting on the parol evidence offered, at page 121, said:

> "Greenleaf, Evidence, Vol. 1, Sec. 284, says that the

> rule does not apply in cases where the original contract was verbal and entire, and a *part, only* was reduced to writing. * * * *'This court has also frequently so held.* (*Ludeke* v. *Sutherland,* 87 Ill. 481; *Laflin* v. *Howe,* 112 id. 253)'." * * *

Wigmore on Evidence (Third Edition) Sec. 2432, refers to some writings as "Memorials which are not *intended as exclusive memorials.—That the extrinsic facts may be shown regardless.* To the same effect are Williston on Contracts, Sec. 632.

Wigmore on Evidence, 3rd Edition, Sec. 2430, pp. 97-99 on "Integration" says:

The answer depends *first on the intent of the parties* * * * and says:

> "This intent must be sought where always intent must be sought (*ante,* Sections 47, 1714, 1740), namely, in *the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice.*"

In discussing receipts and similar documents, Wigmore (Section 2432, page 105) says:

> "It will in generally fall without line of the rule; *i. e.,* it is not intended to be an exclusive memorial, *and the facts may be shown irrespective of the terms of the receipt.*"

The last pronouncement of the rule of construction affecting contracts is contained in *Guhl* v. *Guhl,* 376 Ill. 100 (1941), and the Court at pages 109-110 said:

> "In construing an agreement the rules governing construction and interpretation of contracts generally are applicable. To arrive at a proper conclusion of the terms of a contract, it should be considered in its *entirety to ascertain its general scope or purpose* for out of that will come the *real intention of the parties.* (*Collins* v. *Phillips,* 259 Ill. 405, *Senss* v. *Schuchat, supra.*)"

In *Lyon & Healy* v. *Central Hotel,* 296 Ill. App. 245, 249 (1938) a judgment was confessed on a note and written contract for an organ. The contract also provided that it was "*understood and agreed that no agreement, oral or written, express or implied shall limit or qualify the terms of this contract.*"

The court at page 248 said:

> "The document on which judgment was confessed, and which is the basis of plaintiff's suit, we think *does not represent the entire contract of purchase and sale; if it does, the contract is ambiguous.*"

And at page 249 the Court said:

> "We think the *document is incomplete and ambiguous and therefore parol evidence was admissible to show the terms of the contract.*"

(See our opinion in *Air Conditioning Corp.* v. *Honaker,* 296 Ill. App. 221.)

The court, reviewed the established law of Illinois and following such decisions, held that parol evidence of the entire oral contract was admissible regardless of the written contract which expressly forbade it. (Citing cases.)

In *Hedrick* v. *Donovan,* 248 Ill. 479, in a suit in equity the Court at page 484 said:

> "it is competent by *extrinsic evidence* to show *what the parties, in fact, were contracting about.* This rule frequently is applied, *from necessity.*"

In *Groome* v. *Freyn E. Co.,* 374 Ill. 113 (1940) the Court in considering a contract concerning commissions for sales to the Russian Government, at page 126 said:

> "It is well settled that the construction given by both parties to a contract which might otherwise be doubtful, is entitled to great weight. *Nelson* v. *Colegrove & Co. State Bank,* 354 Ill. 408; *Northern Illinois Coal Corp.* v. *Cryder,* 361 id. 274."

In *Biewer* v. *Mueller,* 254 Ill. 315, the parties orally agreed to exchange various lots, hotels, and improved property.

The Court held that *the entire oral contract remained in force until everything covered by it was performed by the parties* (citing *Laflin* v. *Howe,* 112 Ill. 253; *Platt* v. *Aetna Ins. Co.,* 153 Ill. 113; *Ludeke* v. *Sutherland,* 87 Ill. 481).

In *Ludeke* v. *Sutherland,* 87 Ill. 481, defendant asserted that the *entire verbal agreement could not be shown,* to control the written documents and that all was merged in the deed, notes and mortgage.

The Court in *rejecting* such contention and permitting *all the evidence as to the verbal arrangement,* at page 483 said:

> "The general rule (as to antecedent or contemporaneous parol agreements or declarations), '*does not forbid the establishment by parol of an agreement,* although a deed and notes may have been executed in part performance of such parol agreement.
>
> " 'In such case the verbal agreement remains an integer in full force, and may be proved by parol' * * *. In the case at bar the *deed does not purport to embody the contract of the parties;* it simply conveys the land in question in part fulfillment of the parol agreement * * *.
>
> "*The notes and mortgage do not purport to state the terms of the bargain. They are made, in pursuance of the agreement,* as part performance for the mere purpose of securing part of the purchase money—"

The rule in this case has been approved and reaffirmed in:

Trapp v. *Gordon,* 366 Ill. 102, 110 (1937).
Biewer v. *Mueller,* 254 Ill. 315.
Platt v. *Aetna Insurance Co.,* 153 Ill. 113.
Koelmel v. *Kaelin,* 374 Ill. 209 (1940) and cases cited there.

In *Dillow* v. *Hileman,* 300 Ill. App. 509 (1939), the Court at page 510 said:

> "What was this verbal agreement? The trial court refused to hear evidence of it * * * Where there is a direct reference in writing to verbal agreement, such agreement may be proved by parol evidence even though the *effect be to add material terms and conditions to the writing"* 9 Enc. of Evidence, p. 353, sec. D.

In *Stewart* v. *McIntosh,* 291 Ill. App. 65, the Court at page 77 said:

> *"To give this endorsement the meaning for which plaintiff contends would be to destroy the very purpose for which the trust was created,* as appears from the documents in evidence. * * * Any contrary inference would rest *upon mere speculation* * * *."

In *Smith* v. *Mayfield,* 163 Ill. 447, Mayfield sued to recover commissions for negotiating the sale of certain street car lines.

The Court then at page 454 says:

> "The letter was not a contract between Appellant and Appellee. The *contract was verbal* and entirely executory."

At page 455 the Court said:

> *"It would have worked a rank injustice to have excluded* explanatory testimony showing what those conditions were, and that they were not complied with. (That the road was not built, etc.)" (Citing cases.)

The Court at page 456 said:

> "The rule is that *writings that only* acknowledge the existence of a simple fact *are susceptible of explanation and liable to contradiction."*

In *Scholbe* v. *Schuchardt,* 292 Ill. 529, the Court at page 534 said:

> "It would, indeed, be a hard and *unjust rule of law to be applied to the facts in this case if he were to be held beyond the actual terms of his verbal contract.*
>
> * * * * *

"It is *also the rule that where a contract is uncertain, ambiguous or incomplete the whole agreement may be proven.* (*Stone* v. *Mulvaine,* 217 Ill. 40; *Bradshaw* v. *Combs,* 102 id. 428.)

* * * * *

"* * * By the introduction of such evidence the written contract was not varied but was *simply explained* and set forth in full, so *that its exact meaning might be understood.*"

In *Chicago Daily News Co.* v. *Kohler,* 360 Ill. 351, an action at law, the Court at page 363 said:

"Again, where the terms of an agreement are in any respect ambiguous, and the parties have by their own acts placed a reasonable construction upon them, their interpretation will be adopted by the court. (*Burgess* v. *Badger,* 124 Ill. 288; *People* v. *Murphy,* 119 id. 159.) In *Slack* v. *Knox,* 213 Ill. 190, we said: "It is permissible in construing a contract to *look to the interpretation that the parties* thereto *have placed thereon* in its performance, for assistance in ascertaining its true meaning. *'No extrinsic aid can be more valuable'.*"

U. S. Supreme Court Has Established Equitable Principles.

The United States Supreme Court has frequently given expression to the maxim of equity that it regards substance rather than form. *Craig* v. *Leslie,* 3 Wheat. (U. S.) 563, 578; *Camp* v. *Boyd,* 229 U. S. 530, 559; *Hurley* v. *Atchison, etc. R. Co.,* 213 U. S. 126. In construing a written instrument this court has followed the principle that equity will look into all the circumstances under which the instrument was made so as to *ascertain the intention* of the parties and to *uphold and enforce the rights and duties that spring from that intention. Brick* v. *Brick,* 98 U. S. 514; *Peugh* v. *Davis,* 96 U. S. 332; *Texas* v. *White,* 10 Wall. (U. S.) 68; *Chesapeake, etc. Canal Co.* v. *Hill,* 15 Wall.

(U. S.) 94; *Mauran* v. *Bullus*, 16 Pet. (U. S.) 528. Greater regard is to be had to the *clear intention* of the parties than to any particular words which they may have used in the expression of their intention. *Chesapeake, etc. Canal Co.* v. *Hill, supra.* That *regardless* of what was written, the court must receive evidence of the *entire transaction and its true intent*, and that it is *reversible error to reject* such evidence, *Bank of British N. A.* v. *Cooper*, 137 U. S. 473.

In *Bank of British N. A.* v. *Cooper*, 137 U. S. 473 (1890) Justice Brewer of the U. S. Supreme Court at pages 476-477 said:

> "After the testimony was closed, counsel for the defendant moved to strike from the case all parol evidence tending to affect the *legal construction of the bill of lading* heretofore quoted. * * * The contention now is, that the bill stated the contract with all its terms, and being in writing, could not be varied or controlled by parol testimony. But this contention begs the question. The mere receipt of a bill of lading, of goods, is not necessarily an assent to the proposition that such bill of lading *states the contract* and the *whole* contract between the parties. Such bills may or may not be the contract. They may be nothing more, and *intended* to be nothing more, than *memoranda* or receipts. *Whether they are the entire contract, or simply in the nature of receipts, is not a question of law for the court, but one of fact for the jury.*" (Italics supplied.)

In Williston on Contracts, Sec. 618 it is said:

Primary rules of "interpretation".

> "4. The circumstances under which a writing was made *may always* be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made; and *all the surrounding* circumstances at that time necessarily *throw light upon the meaning* of the contract," cited Restatement of Law, Sec. 235 (d) 236.

In *Missouri Pac. R. Co.* v. *Texas & Pacific Ry. Co.*, 282 Fed. 61 (C. A. A. 5th), $23,000,000 of bonds specified that "interest be paid out of the net income of the railway company." The coupons required payment on *specified* interest dates. The Court, at page 63, says:

> "The conflicting contentions (one, for annual payments as called for by the bonds and coupons, and the other, that the board's discretion should prevail), call for a consideration of circumstances attending the issue of the income bonds, of provisions contained in the bonds, in the coupons, and in the mortgage, *and of conduct of parties to the transaction at and near the time when the instrument mentioned became effective, indicative of what those parties understood to be the meaning and effect of the instruments.*"

The Court at Page 70 said: • • •

> *"In determining the meaning of the provisions as to interest,* • • • it is proper to consider, not only the language of those provisions, but the *situation dealt with by the transaction of which the instruments containing those provisions were parts, and the objects or purposes sought to be accomplished by the parties to that transaction.*"

P. 71.

> *"During the many years of such silence and inaction of income bond-holders* • • • *knowledge of that fact and of the fact* that the surplus was being used to pay for maintenance, improvements, new equipment, etc., *was readily accessible, by the company's formal and public reports.*
>
> "It may be *inferred* that many of the income bondholders *were aware of those facts,* • • •
>
> "The provisions in question are considered not to be such as to justify the court in giving them a *meaning other than the one which* the *conduct of the parties to the transaction in which they were used shows that those parties understood and intended them* to have when the transaction was entered into and put into effect. The case is one of the adoption of the court of the interpretation given to a contract by the parties

thereto. *Hunting Elevator Co.* v. *Bosworth*, 179 U. S. 415, 435, 21 Sup. Ct. 183, 45 L. Ed. 256; *Thronateeska Pecan Co.* v. *Matthews*, (C. A. A.) 277 Fed. 361."

In *Day* v. *Ogdenburg Railway Co.*, 107 N. Y. 129, 142, the court held that the whole contract arrangement, whether oral or written, or both, and the consideration therefor will prevail over any conflicting language. It further *held that any construction which would destroy the intent of the parties would not be countenanced by the court.*

II.

(a) It Is the Established Law in Illinois That a Court Cannot Impeach a Prior Decree of Another Court. It Must Respect and Give Full Effect, and Sustain It, According to the Intention of the Court That Made It and the Parties Intended to Be Bound by It.

(b) If the Decree Was Doubtful, Evidence, Written or Oral, Must Be Admitted to Explain Its Intent, Purpose, Meaning and Understanding.

Consent decrees are subject to the same rules of construction by a court in equity as apply to other documents.

If the lower court had any doubt as to the effect of Judge Wilkerson's findings, decree and the reservation it should have received and given effect to all the evidence, oral and written, concerning the entire agreement, the intent, purpose and understanding of the parties, all the circumstances surrounding the transaction, the situation of the parties, the nature of the subject matter, the result sought to be accomplished and their own interpretation and performances under it so as to arrive at the true intent of the parties to the transaction.

This evidence would have enabled the later court (Judge Briggle) to resolve all doubts, and in this case, construe

the reservation in the finding of facts and decree of Judge Wilkerson, according to the intent of parties. *This purpose and intent,* (it is admitted by respondents) *was not to release the directors.*

In equity and in law, the decree is subject to the same rules of construction and interpretation in any case of doubt as are any other writings. There are no different rules of construction, except *in favor of giving the decree* of a court the fullest effect and scope it purports to have and the respect and sanctity it deserves as a judicial pronouncement binding on thousands of people all over the United States in so important a matter.

Judge Briggle had no power or authority and *could not impeach* or disregard the decree and findings, nor fail to give them full scope, effect and intent, nor could he substitute his own opinion for what the decree and findings plainly say.

In *Harvey* v. *Drew*, 82 Ill. 606, the Court held that parol evidence was admissible to show for what the judgment was recovered, not to contradict the record, but to show the real cause of action involved in the litigation. At page 609 the Court said:

> "* * * It has *never been doubted that parol testimony was* admissible to show for what the judgment was recovered, *not, of course to contradict or vary the record,* but to show the *real cause of action* involved in the litigation. * * *"

In *People* v. *Becker*, 253 Ill. 131, involving a prior judgment in a case of alleged tort feasors, and that the satisfaction and payment of that judgment operated as a release to an allegedly joint wrongdoer, the same question arose. The Court held that oral evidence is proper to explain what was included or *intended to be included* in the former adjudication. (Citing *Palmer* v. *Sanger*, 143 Ill. 34; *C. B. & Q. Rd.* v. *Schaffer*, 124 Ill. 112; Greenleaf on evi-

dence.) (Please note: We have also cited the case of *People* v. *Becker* later in our brief under the subject of Joint Tort Feasors.)

In our case Insull Jr. and Stuart seek to escape by claiming that they were indeed joint tort feasors (R. 220) if at all, and that the banks, by paying the amount decreed and satisfying the decree, there resulted a discharge to Insull and Stuart. The Becker case stated that the established law of Illinois was to the contrary.

In *Palmer* v. *Sanger,* 143 Ill. 34, the Court held that parol evidence was necessary. At page 136 the Court said:

> "What disposition the Court (in the New York judgment) made of the other items is left in doubt, and parol evidence to remove that *uncertainty* does not contradict the record in the sense that makes such testimony inadmissible as against the record."

In *Aloe* v. *Lowe,* 298 Ill. 404, the court held it is well settled that a decree is to be construed with reference to the issues *it was intended to decide,* and if its language is broader than is required it will be limited by construction so that its effect shall be such, only, as is needed for the purposes of the case that has been made and the issues that have been decided. (*City of Vicksburg* v. *Henson,* 231 U. S. 259; *Graham* v. *Chamberlain,* 3 Wall. 704; *Doscher* v. *Blackiston,* 7 Ore. 403; *Clay* v. *Hildebrand,* 34 Kan. 701.)

In *C. B. & Q. R. R.* v. *Schaffer,* 124 Ill. 112, the court, at page 121, said:

> "Where a former recovery (judgment) is relied on as a bar, parol evidence, *not contradictory of the record,* may, in case of such doubt, be introduced to show what was included within and investigated on the trial of the issue. * * * (*Vanlandingham* v. *Ryan,* 17 Ill. 25; *Barger* v. *Hobbs,* 67 id. 592. Greenleaf on Evidence, vol. 1, sec. 532 (14th ed.), says:
>
> 'When a former judgment is shown by way of bar, whether by pleading *or by evidence,* it is competent for the plaintiff to reply, that it did not relate to the

same property or transaction on controversy in the action to which it is set up in bar, and the question of identity thus raised *is to be determined by the jury upon the evidence adduced'.*"

The Illinois rule expressly holds that an agreement under which a judgment is taken controls.

In *Talcott* v. *Grant Wire and Spring Co.*, 131 Ill. 248, the court held that *parol evidence is competent to show the agreement under which a party takes a judgment*, as, that it was procured and allowed to be taken immediately, *to be used as a step* on a creditor's bill whereby to reach assets, not only for the plaintiff in the judgment, but for all other creditors of the same debtor. The effect of such evidence is *not to impeach the judgment.* * * * The Court said, at page 254:

"The evidence offered, and excluded by the court, was proper and competent evidence. It was *not offered to impeach* the judgment in any manner, but to show the purpose for which they were to be used as constituting a step in further proceedings. * * *"

In 34 Corpus Juris at page 506, Sec. 803, it is said:

"*Extrinsic Evidence.* Evidence outside the record, even parol, is admissible to show for what the judgment was recovered, that is, what was the real cause of action. *A judgment may be construed in the light of the circumstances* under which *it was rendered.*" * * * Citing: *Russell* v. *Place*, 94 U. S. 606, 24 L. ed. 214; *People* v. *Becker*, 253 Ill. 131, 97 N. E. 269; *Harvey* v. *Drew*, 82 Ill. 606; *Gould* v. *Svendsgaard*, 141 Minn. 437, 170 N. W. 595; *Matter of Pine's Stream*, 129 App. Div. 929, 114 N. Y. S. 681; *Devine* v. *Kilcommons*, 67 Misc. 177, 122 N. Y. S. 260; *LaBrie* v. *McKim*, 56 Ex. Civ. A. 322, 120 S. W. 1083; *Gilbert* v. *Earl*, 47 Vt. 9.

In 34 Corpus Juris it is further said (506) (note 58):

"The same rules of interpretation apply in ascertaining the meaning of a *court order or judgment* as in

ascertaining the meaning of any other writing, and if the language be in any decree uncertain, we may properly refer to the circumstances surrounding the making of the order or judgment." Ex. p. Ambrose, 72 Cal. 398, 401, 14 P. 33, 35.

(c) In Illinois a Decree Does Not Terminate a Cause of Action Against Wrongdoers If the Intention Appears to the Contrary.

National Lock Co. v. *Hogland* (C. C. A. 7, 1938) 101 F. (2d) 576, arising in Illinois. There a *final decree* had been entered approving a reorganization plan under Section 77-B of the Bankruptcy Act, a previous interlocutory order contained a provision whereby the right of the corporation to prosecute certain suits against its officers and directors for misappropriation was *reserved to the corporation.*

In the suit subsequently brought against the officers and directors, they *contended* for dismissal on the ground that the reorganization *decree terminated the court's supervision of the corporation* and that it lost jurisdiction when it entered the final decree, and therefore the reservation was of no force.

However, the Circuit Court of Appeals (7th Circuit) affirmed judgment against the defendants and held that the *reservation was a contract by the corporation, the court and the intervening stockholders* which was to *"subsist notwithstanding the entry of the final decree"* and "cannot be repudiated with the sanction of a court of equity." In referring to the reservation in the plan which was approved, the court said, page 585:

> "they represent that certain facts existed and that certain acts will be done which constitute an *inducement for the acceptance of the proposed plan."* (Italics added.)

(How like the case at bar?)

The same Circuit Court of Appeals said:

"We must assume that the district judge in making his final decree in which he *excepted from the restraining order* the 'said order of February 26, 1935,' recognized and intended to give effect to the representation of paragraph 6 of the modified petition and plan of reorganization which recited that the 'final decree of this court shall in nowise *estop or prejudice* the Debtor from bringing and prosecuting the suit or suits against officers, directors and others authorized in the order of this court, dated February 26, 1935."

And at page 586, the Court said:

"*It was contemplated and understood by both the court and the interested parties that the purpose of the authorization of the suit in question was to restore assets to the corporation for the benefit of the corporation, stockholders and creditors.*"

"* * * The recital in the modified petition and the plan of reorganization that the entry of a final decree was not *to affect the authority* to proceed under the order of February 26, 1935, *indicates that the aforesaid understanding* and *intention were common to the* interested parties."

At page 587 the Court said:

"* * * But it does not result in double recovery or a violation of the doctrine of 'election'. It has been said by the United States Supreme Court in *Friederichsen* v. *Renard,* 247 U. S. 207, 38 S. Ct. 450, 62 L. Ed. 1075, that 'At best this doctrine of election of remedies is a harsh, and now *largely obsolete rule,* the *scope of which should not be extended.* * * *'"

(In the *National Lock Co.* case the attorney who *successfully* contended that the action *was not barred against the wrong doing directors* is the *same counsel* who now contends exactly the opposite in the case at bar.)

Bogert on Trusts says:

"* * * The wrongdoing defendant has no real ground for complaint against the use of several means of redress for the same wrong, if in fact they are needed. * * *"

In *May* v. *LeClair*, 11 Wall. 217, 236, this Court said:

> "The cardinal principal is that the wrongdoer *shall derive no benefit from his wrong.*"

In re The Mariska (C. C. A. 7, 1901), 107 Fed. 989, involved a proceeding in admiralty by a shipowner to obtain contribution from another shipowner for damages he was required *by decree*, the instant defendant not having been a party to the prior suit. At page 993 the Court said:

> "The *decree is of moment to establish the fact of compulsory payment* of damages by the Jay Gould. * * *"

The Court held that parol evidence was competent to show what the subject matter of the other decree was. (Citing *O'Shea* v. *Railroad Co.*, 105 Fed. 559 (C. C. A. 7th Cir.)

In *Jones Syndicate* v. *Commissioner of Internal Revenue*, C. C. A. 7th (1927), 23 F. 2d 833, the court held that parol evidence to explain the real character of the transaction involved in written instruments is admissible against third parties, even if the third party is the United States Government. The court, at page 834, said:

> "Such evidence is admissible against third parties. *In re Assessment of Shields Bros.*, 134 Ia. 559, 111 N. W. 963, *Signa Iron Co.* v. *Greene* (C. C. A. .....), 88 F. 207, *O'Shea* v. *N. Y. C. & St. L. R. Co.* (C. C. A. 7—1902), 105 F. 559, *Michell* v. *McShane* (C. C. A. .....), 220 F. 878, 22 Corpus Juris 1292."

Parol evidence is admissible as against a stranger to a decree of court, to explain and sustain the decree, if there is the least doubt.

The circuit court of appeals in our case overlooked the established law of Illinois on this subject and its own prior decisions.

(d) Respondents as Stockholders Are in No Position to Attack or Impeach the Decree of Judge Wilkerson.

The proceedings before Judge Wilkerson were part of the agreement and arrangement for settlement. The decree was by consent of the parties, to carry out *their Agreement and their intent, meaning and understanding.*

Defendants as stockholders of I. U. I. (R. 25) cannot collaterally attack the decree of the District Court. They are bound because the same decree was also entered in the Bankruptcy Proceedings of I. U. I. preserving the same rights of action against them. It was binding on I. U. I. and its Trustee in Bankruptcy. Defendants, being stockholders and officers of the corporation (complaint, R. 3, *et seq.*) were thereby represented, and are bound by that decree in the same manner as if they were parties to the proceeding. (*Singer* v. *Hutchinson,* 183 Ill. 606, 613; *O'Connor* v. *Board of Trustees,* 247 Ill. 54, 59.)

In *Sanger* v. *Upton,* 91 U. S. 56, arising in the Northern District of Illinois, this Honorable Court, in a somewhat similar situation, at page 59 said:

> "In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. * * * If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, * * *."

The decision in Sanger *vs.* Upton was followed by this Court in *Grant* v. *Leach,* 280 U. S. 350, 360.

Judge Briggle had no authority in 1940 to disturb such decree to impeach its effect or to construe it contrary to the intent, purpose, meaning and understanding of the court (Judge Wilkerson) who entered it, or of the intent, purpose, meaning or understanding of all the parties to that proceeding who requested the court to make the de-

cree. Judge Wilkerson found it fair, just and equitable to the parties to be bound thereby.

Even if the respondent's claim not to have been bound by the decree, it is the established law that a stranger to the proceeding cannot collaterally attach a decree which does not order him to do anything or take away any property right which he had at the time such decree was entered. (34 C. J. 526 and cases cited. *Ellison* v. *Drake*, 145 Ill. 500.) The respondents are estopped from complaining of the decree. *Oliver* v. *Ross*, 289 Ill. 624, 640 (Floyd E. Thompson, Judge). Such silence has a fraudulent effect on the debenture holders. *Milligan* v. *Miller*, 253 Ill. 511. In either event, the Circuit Court of Appeals did not correctly apply the established law of Illinois in this respect.

III.

DISTRICT COURT PROCEEDED ERRONEOUSLY AND IMPROVIDENTLY UNDER RULE 56 ESPECIALLY SINCE HE FOUND THE INTENTION TO BE DIFFERENT THAN THAT SHOWN BY THE UNCONTROVERTED EVIDENCE.

Plaintiffs Were Entitled to a Trial by Jury and Due Process of Law.

In 1939, two years after the bank settlement proceeding, the respondent directors made a motion for summary judgment before Judge Wilkerson, but he transferred the cause. In 1940 it came up before Judge Briggle (R. 286-287).

The District Court acted erroneously and improvidently in granting judgment in this case summarily under Rule 56 of the Rules of Federal Procedure, the face of the objections of the plaintiffs (see plaintiffs' counter motions to strike and Answer on Facts, R. 224-268) and in rejecting uncontroverted evidence of the agreement, and of the intention of the parties.

Without granting a trial by jury, as demanded (R. 265-277) he found that the intention of the parties was different than that shown in the record.

Judge Briggle distorted the agreement and the petition. He said:

> "There is not a single expression that even hints that plaintiffs were *only* contracting with the banks. (R. 293. Italics supplied.)" (This is exactly contrary to the facts as heretofore shown),

and proceeded to inject an intention that was not a fact. He said:

> "By throwing in Paragraph K, it is hoped to have the settlement construed as something it was not." (R. 293.)

In finding that the intention of the parties was different than that shown by the uncontroverted facts, Judge Briggle proceeded contrary to Rule 56, which authorizes summary judgment proceedings only where the record shows that "there is no genuine issue as to any material fact".

If the court found any doubt in some decree, some proceeding or some agreement of other persons, he was in duty bound to hear the facts which would have cleared up any such doubt. We believe it was an abuse of discretion to dispose of the controversies in this case summarily under that Rule.

We believe such procedure does not afford the litigants due process of law.

If Judge Briggle found any controversy or doubt about the intention of the parties, or the former decree, findings or proceedings, he had no right to decide the issue under Rule 56. He should have called a jury to hear the evidence (or at least heard the evidence himself).

This evidence concerning the intent would have prevented the emasculation, distortion and misconstruction of the decree of Judge Wilkerson and of the reservation of

all rights of action against the directors, which reservation appears to have been meaningful and vital to the thousands of people who relied on it, and to make the settlement fair, just and equitable as found by the Court which approved it (R. 170). *The reservation was so found by Judge Wilkerson as a fact, and was one of the conditions upon which the settlement was contingent* (R. 166, 167).

IV.

DIRECTORS AND THE BANKS WERE NOT JOINT TORT-FEASORS. DIRECTORS WERE TRUSTEES.

(Reply to Defendants' Point III, Pages 30, 34.)

Respondents now contend that they were only joint tort-feasors if at all, with the banks, and only liable for the same wrongs as had been charged against the settling banks; that now they, the respondents, are entitled to escape, because they are such joint tort-feasors with the banks.

They said under oath in an affidavit attached to their motion (R. 220):

> "Whatever wrong was committed, if any, was committed *jointly* by the banks and these defendants as directors." (Affidavit of Samuel Insull, Jr., H. L. Stuart.)

The respondents contend this to be so as a matter of law, regardless of the nature of their own connection with the debenture holders and with I. U. I. and regardless of the amount recovered by the debenture holders for wrong doings.

The individual suits against the banks was for refusal to share collateral with the debenture holders and sought a lien or interest in such collateral. This the Court decreed against. (*Kelly* v. *Banks*, 11 Fed. Supp. 497; Remanded

for Findings, 85 Fed. (2d) 61.) The directors, respondents, were not parties,—no relief was asked against them.

Each bank was a defendant in a separate transaction and in a separate suit, and all the banks were also defendants in a joint suit. Each had made a separate loan at different times and under different circumstances. Some early loans were made from some of them, not in violation of the 50% restrictive clause in the debenture, and some afterwards, some with knowledge of the restrictions and some without such knowledge. They had demanded security and obtained collateral. They insisted that they had a right to such collateral and that they followed the established law of "The Law Merchant."

Each bank asserted that it had no notice of the debenture restrictions and that they assumed no duties to any debenture holder.

The New York Court dismissed the joint suit charging the banks with acting jointly. The decree was final. No appeal was taken. (*Kelly* v. *Banks,* 11 Fed. Sup. 497.)

The directors, however, *induced, caused, resolved, ordered* and *made these loans.* They *knew the debenture covenants.* They had *assumed responsibilities as trustees* of a *special investment trust,* to the investors *whom they induced to trust them,* their advertised reputation and *integrity as managers, operators and financiers* of the Insull Utilities, and who would *carefully select, control and safeguard the securities* which were protection for the debentures.

The suit against the directors is for accounting for the violations of their trust which they assumed to the debenture holders by their representations and solicitations made by millions of circulars, papers, letters and public announcements. (Please refer to our Statement of Facts, *supra.*)

Under the law of Illinois such directors *became trustees*

for the debenture holder creditors who were invited and *induced* to rely thereon.

Delano v. *Case*, 121 Ill. 247.
Chicago Title & Trust Company v. *Munday*, 297 Ill. 555, 562.
Albers v. *Sullivan*, 287 Ill. App. 461, 465-7.

The decision of the Circuit Court of Appeals that the directors were not trustees is in conflict with the above decisions and is also in conflict with the decisions of this Court, other Circuit Courts of Appeal, and other state Courts:

Jackson v. *Ludeling*, 88 U. S. 616.
Boyd v. *Schneider*, 131 Fed. 223 (C. C. A. 7).
Strauss v. *United States Fidelity & Guaranty Co.*, 63 Fed. (2) 174, 179 (C. C. A. 4).
Davis v. *Virginia Ry. & Power Co.*, 229 Fed. 633 (C. C. A. 4).
Whiteford v. *Moehlenpah*, 196 Wis. 10.
Lynch v. *Conger*, 168 N. Y. Supp. 855, 858, affirmed 229 N. Y. 543.
Belden v. *Burke*, 25 N. Y. Supp. 601.
Wells v. *Carlsen*, 130 Neb. 773, 226 N. W. 618.

It takes only the simplest common sense to know that in a gigantic financial catastrophe of this kind, it is afterwards, usually discovered that in thousands of different improper or illegal ways, and at different times, and under different conditions, some have improperly used or wasted cash, some have rigged the market and some have squandered or pledged assets in different amounts, in different ways or at different times, or had induced or made breach of different covenants in different obligations, under different circumstances, and different times, to different people, or had committed the different wrongful acts in the circumstances which the complaint charges, at different times,—(or that some one director might have been absent from one meeting or had no knowledge or connection of one

particular pledge transaction, or one particular wrongdoing),—that all can be only *jointly* liable for *every* and *any* such different obligation or different wrongful transaction?

It is preposterous to say that creditors of a bankrupt can never recover any and everything from each separate individual who is obligated to them in any and every way, or who owes money to the bankrupt corporation (whether the action or liability is in trespass, damages, debt, assumpsit, contract, equity, foreclosure, accounting, specific performance, detinue, etc., etc.),—that they cannot procure from any one or more of them whom they can find, the payment of an obligation or return of property questionably taken, or demand an accounting from each and every person who should account, or accept some money settlement from any one or more of the great many persons or corporations who may be claimed to be responsible, or who did some legally improper act or thing, until they get complete satisfaction at one time from all.

It is ridiculous to contend that all creditors must sue everyone in any way liable to them or to the corporation in one case; that they must wait (forever) to get service of process on all people who avoid the jurisdiction or cannot be found and to pursue all litigations against all of them whose liabilities, obligations, duties and commitments are different, *to the bitter and expensive end,* and do nothing at any time to recover partially from one or more of them for their losses, without losing their right to recover the balance from the others.

Could all such people escape for the balance of the $57,000,000 lost just because some alleged wrongdoers in good faith make partial restitution or settlement? Can all the other parties who brought about the huge losses at different times under different circumstances and under different obligations and liabilities and in different ways,

—escape? Such doctrine is just *nonsense*. It violates every principle of right and justice and equity, and the due administration thereof.

In a decision *In re Insull Utility Investments, Inc., bankrupt*, 6 F. Supp. 653, Judge Evans (senior judge of the Circuit Court of Appeals for the 7th Circuit, and then sitting in the District Court), said, at page 658:

> "A brief review of the situation that existed when the receiver was appointed is herewith attempted. It is quite impossible to separate the application for the appointment of a receiver in Insull Utility Investments, Inc., from like applications in Middle West and Corporation Securities Companies.
>
> "Three companies were organized and promoted by the so-called Insull interests. They all revolved about the activities of one Samuel Insull, Sr. One company, the Middle West, was a holding company, and the other two are investments trusts.
>
> "Neither the genus, the holding company, nor the specie, the investment trust, can find but little justification for legal existence. * * *
>
> "As it was conducted in 1929, the investment trust was nothing but a glorified gambling institution. * * *
>
> "In 1929 (referring to Eaton, etc.), piracy was not outlawed, nor, it seems, was there any closed season on the operations of those engaged in this popular pastime on the sea of high finance. When the smoke of this conflict disappeared and the damage was appraised, it was found that the assets of the Insull Utility Investments, Inc., were sadly depleted.
>
> "In the succeeding months the company borrowed vast and ever vaster sums of money from banks, to secure which it hypothecated most of its remaining assets. * * *" (Interpolation supplied.)

We do not believe that all or any of the respondents were tort feasors in the sense used under the same archaic common law rules which defendants now seek shelter under. They are asked to account for wrongdoings as Trustees and for inducing, making, ordering and directing wrongful pledges. We do not believe, and the New York

Court finally held that the banks acting together were not tort feasors. We do not believe that the respondents were joint tort feasors with the banks or all or any of them, and that in justice and equity no wrongdoer should escape, even if a joint wrongdoer. (*May* v. *LeClair,* 11 Wall. 217, 236, *supra; Veazie* v. *Williams,* 8 How. (U. S.) 134; *Lovejoy* v. *Murray,* 3 Wall. 1, U. S. Supreme, *infra.*)

The Courts of Illinois Have Studiously Distinguished All Situations to Avoid Releasing Other Wrongdoers: the Overwhelming Weight of Outside Authority Is the Same.

To get *away* from the harsh ancient common law rule of "release" (which is indefensible and only helps wrongdoers) in Illinois the Courts have made every effort to prevent the escape of any wrongdoers who seek to escape by *insisting* that they *are* joint wrongdoers and therefore entitled to escape. The Courts of Illinois and of every other enlightened jurisdiction have seized upon the lightest difference in the situation of parties who contribute to or participate in the same transaction which causes losses and have sustained recovery for uncompensated damages in every case (a) where the slightest intention was shown not to release (b) have held proper every instrument which showed such intent, (c) have called such instruments *not* "releases" but covenants not to sue—or (d) to have the effect of such covenants, and in every such instance the courts have held that the other party to such tort is not released.

The decision of the Court of Appeals that the directors and the banks were joint tort feasors is in conflict with the decision in the bank litigation (*Kelly* v. *Central Hanover Bank & Trust Co.,* 11 Fed. Supp. 497 (85 Fed. (2d) 61), and is in conflict with the following decisions:

People v. *Becker,* 253 Ill. 131.

Barnes v. *Barnett,* 188 Ill. App. 32.

Scharfenstein v. *Forest City Knitting Co.*, 253 Ill. App. 190, 202 (certiorari denied by Illinois Supreme Court, 254 Ill. App. xviii).

Dougherty v. *California Kettleman Oil Royalties*, 13 Calif. (2) 174, 88 P. (2d) 690 (1939).

Flannery v. *Flannery Bolt Co.*, 108 Fed. (2d) 531, (C. C. A. 3, 1940) cert. denied, 60 S. Ct. 615.

Arkansas National Bank v. *Martin*, 110 Ark. 578, 163 S. W. 795 (1914).

Veazie v. *Williams*, 8 How. (U. S.) 134.

Dougherty v. *Calif. Kettleman Oil R. Inc.*, 13 Calif. (2) 174.

Young v. *Anderson*, 33 Idaho 522.

Pittsburgh Rys. Co. v. *Chapman*, 145 Fed. 886 (C. C. A. 3).

Defendants' attempt to distinguish the case of *People* v. *Becker*, 253 Ill. 131, cited by us, in our Brief in Support, on the ground that the two constitutional officers involved had "separate and distinct obligations *to the public.*" That is also the fact in the case at bar. The directors and the banks had separate and distinct obligations to the debenture holders. The banks had an obligation only to account to the debenture holders for their share of the securities as required by the covenant, provided the Law Merchant was not sustained,—which it was.

The directors had an obligation to see to it that (a) *payment was provided* for the payment of such debentures (R. 14, par. 1), otherwise, (b) that the securities of the company were not to be pledged without providing equal and ratable security for the debentures; they had also (c) induced the investors to rely on their standing, reputation and control for the safety of the debentures, and assumed the obligation to refrain from doing anything with the company or its assets which might injure the debenture holders. They had so solemnly assured, promised, represented and covenanted.

V.

THIS COURT HAS HELD THAT THE LIABILITY OF THE JOINT WRONGDOER REMAINS IN MORALS AND ON PRINCIPLE AND DOES NOT RELEASE HIM ON ANY EQUITABLE CONSIDERATION. WRONGDOER SHALL DERIVE NO BENEFIT FROM HIS WRONG.

In *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1, the United States Supreme Court rejected the closely analogous doctrine that a judgment against one joint trespasser is a bar to a suit against another for the same trespass and held that nothing short of full satisfaction, or its equivalent can make such judgment a bar. At page 16, Mr. Justice Miller said:

> "*The whole theory of the opposite view is based upon technical, artificial, and unsatisfactory reasoning.* * * *
>
> "But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? *His liability must remain, in morals and on principle,* until he does this. The judgment against his co-trespasser does not affect him so as to release him on *any equitable consideration.*
>
> "But it is not easy to see how he is so affected, until plaintiff has received full satisfaction, or that which the law must consider as such.

The Supreme Court rejects the theory asserted by the respondents in this case as was asserted by the defendants in the Lovejoy case, and holds that even though title to property was transferred to one of the trespassers who settled it was absurd to contend that this amounted to a

satisfaction, and the court in discussing that point says, at page 17:

> "In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrong-doer. *It is sufficient to state the proposition to show its injustice.*"

We do not admit that debenture holders transferred any title. They had none. The Answer on the Facts (R. 230-268) refutes any such assertion. The same Court decided the case of *May* v. *LeClair*, 11 Wall. 217, *supra*, in which this Court said (page 236):

> "The *cardinal* principle is that the wrongdoer shall derive no benefit from his wrong." (Escape from accounting. Interpolation is ours.)

Defendants attempt to distinguish *Veazie* v. *Williams*, 49 U. S. 134, cited by us. This Honorable Court held to the same effect as in the Lovejoy case. In the Veazie case the instrument was *in form an actual formal release* and not a covenant not to sue as defendants imply. *In fact it did not even contain any reservation*, but the court considered the *surrounding circumstances and determined the intention of* the parties to be that it released only (one of the wrong-doers in the *same* one transaction) the releasee. The language of the Supreme Court was not "dictum" as defendants say, but was the ruling of the court on the specific question before it.

(In our Brief in Support to the Petition for Certiorari we discuss some of the other Illinois authorities on "Joint" Tort (?), and we also discuss other Illinois authorities under "Intent," "Release" and "Covenants," later in this brief.)

VI.

DEFENDANTS ARE NOT ENTITLED TO UNDESERVED WINDFALL IN THIS CASE.

This expression has found its way in many courts and in many different statements. It is summarized in 34 Cyc. p. 1083, which says:

> "As this *technical* rule (release of one and all) often *defeats* the avowed intent of the releasor and *frequently gives an undeserved windfall.* * * * the courts show a very decided tendency to defeat its operation by construing such instruments as covenants not to sue. * * *" (Citing cases.)

In the "Comment" in the Restatement of Torts (1939,) under Sec. 885, it is stated:

> "It frequently resulted in the unintended and unpaid for discharge of one of the tort-feasors. The rule is not consistent with the modern American point of view."

VII.

NO RELEASE UNDER LAW OF ILLINOIS.

In Illinois the intent of the parties to a settlement contract must prevail. This is true in tort as well as in contract cases. It is reversible error to reject evidence of such intent.

Contracts in the nature of releases or covenants not to sue are no exception.

Any other rule would be harsh and unconscionable and would lead to the gravest injustice.

In Illinois the general rule of release governing unqualified releases does not apply where the release contains a reservation of the right to sue others jointly liable.

This point is crucial.

Respondents cite not one authority in Illinois holding to the contrary.

In **every case** presented to the Illinois courts, whether in **contract or tort,** and **whether** the instrument was in form a **release or covenant** not to sue or other transaction which it was claimed operated to discharge others jointly liable, the Illinois courts have consistently held that unless the injured party has received full compensation for his damages:

(a) **effect must be given to the intention of the parties;**

(b) That if it appears that **the intention was not** to release others, the instrument or transaction **is treated as if it were a covenant not to sue without releasing any others;**

(c) That an **express reservation** of a cause of action against a joint debtor or joint tort feasor in a release **will be given effect regardless of the use of words of "release"** in the same document;

(d) That the **Court will construe** a settlement arrangement to **amount only to the effect of a covenant not to sue,** if it was not intended to release other wrongdoers;

(e) That a release is not superior to any other agreement, but on the contrary may always be **contradicted or explained.**

(There are no cases to the contrary in Illinois. There is no distinction between "tort" or "contract" releases or covenants.)

Parmelee v. *Lawrence,* 44 Ill. 405 (1867).
Severin v. *Eddy,* 52 Ill. 189 (1869).
Emory v. *Addis,* 71 Ill. 273 (1874).
Miller v. *Dobschultz,* 89 Ill. 176 (1878).
Callaghan v. *Myers,* 89 Ill. 566 (1878).
Moore v. *Stanwood,* 98 Ill. 605 (1881).
Thomason v. *Clark,* 31 Ill. App. 404 (1889).
Wagner v. *Union Stockyards,* 41 Ill. App. 408 (1891).

City of Chicago v. *Babcock*, 143 Ill. 358 (1892).
Dupee v. *Blake*, 148 Ill. 453 (1893).
West Chicago R. R. v. *Piper*, 165 Ill. 325 (1897).
Chicago, etc. R. R. v. *Hines*, 82 Ill. App. 488 (1898).
Clark v. *Mallory*, 185 Ill. 227 (1900).
City of Chicago v. *Smith*, 95 Ill. App. 335 (1900).
Brennan v. *Electric Inst. Co.*, 120 Ill. App. 461 (1905).
Skinner v. *Sullivan*, 127 Ill. App. 657 (1906).
Chicago & Alton v. *Averill*, 224 Ill. 516 (1906).
Wallner v. *Chicago Traction Co.*, 245 Ill. 148 (1910).
Gore v. *Henrotin*, 165 Ill. App. 222 (1911).
Nickerson v. *Supplee*, 174 Ill. App. 136 (1912).
Miller v. *Lloyd*, 181 Ill. App. 230 (191.....).
Balsley v. *Hetzel*, 182 Ill. App. 136 (1913).
Barnes v. *Barnett*, 188 Ill. App. 32 (1914).
Baxter v. *Rothschild*, 204 Ill. App. 346 (1917).
Purinton v. *Belt Ry. Co.*, 204 Ill. App. 382 (1917).
Nixon v. *City of Chicago*, 212 Ill. App. 365 (1918).
Wallace v. *Armstrong*, 236 Ill. App. 457 (1925).
Van Meter v. *Gurney*, 251 Ill. App. 184 (1929).
Scharfenstein v. *Forest City*, 253 Ill. App. 190 (1929).
Forster v. *Sheridan Bank*, 257 Ill. App. 463 (1930).
Reams v. *Janoski*, 268 Ill. App. 8 (1932).
Onyschuk v. *Vincent*, 277 Ill. App. 414 (1934).
Puck v. *City of Chicago*, 281 Ill. App. 6 (1935).

We do not admit that either any of the directors or either one of the banks were *tort* feasors, or that they were not accountable or liable in any other legal or equitable manner. But we do say, that even if they all could be considered as *joint tort* feasors, nevertheless they cannot escape responsibility in this case.

Under the Illinois law, if a release, as in the case at bar, *contains language manifesting* an intention not to discharge others jointly liable, effect must be given to that intention and this is done by treating the release as if it were a covenant not to sue, leaving the liability of the others unaffected. (*Parmelee* v. *Lawrence*, 43 Ill. 145.)

At page 410 the Court in the Parmelee case said:

> "But a release, like every other written instrument, *must be so construed as to carry out the intention of the parties.* The intention is to be sought in the language of the instrument itself when read in the *light of the circumstances which surrounded* the transaction. The court which interprets must place itself as nearly as possible in the position of the parties when they acted."

(This case was followed and approved in *City of Chicago* v. *Babcock*, 143 Ill. 358,—a tort case.)

In *City* v. *Babcock*, 143 Ill. 358, the facts were: Emma Babcock recovered a judgment for $1,500, against the city, which it sought to reverse. She had *brought two suits* to recover judgments for the injuries she sustained (p. 363)—one the suit at bar against the City, the other a suit against Lecardi, owner of the building, on the public sidewalk of which, she claimed to have been hurt.

The Court says:

> "Afterwards Lecardi paid to the attorneys of appellee Babcock the sum of $150, the larger portion of which was applied by the attorneys in paying the costs of the suit and a sum $30 or $40 given to appellee. * * *
>
> "She signed a paper '*it is hereby agreed* that no *action shall be begun against Lecardi* by reason of any matters existing at this time by the undersigned. Given for good consideration.' Signed Emma Babcock, by Pease & Williams, Attorneys." * * *
>
> **(In effect this is analogous to what the decree made by Judge Wilkerson enjoined in the case at bar.)**

It further appears that afterwards the suit was dismissed out of court at plaintiff's costs.

The court *admitted evidence of the settlement with Lecardi* (p. 365) offered by either party *that had any bearing upon the question* of the nature of the transaction and arrangements between appellee and either Lecardi or the plaintiff.

(In the case at bar, the judge refused such evidence.)

The Court in the Babcock case submitted all such evidence to the jury.

The jury found a verdict against the City for $1,500. (Evidently the jury was satisfied that the $150 obtained from the joint tort feasor was not full compensation. Interpolations are ours.)

The Court held (page 366):

"*Here there is no claim of a technical release under seal.*"

(There is no claim in the case at bar that any debenture holder executed any kind of a release to anybody.) (Interpolations ours.)

"The pending suit against Lecardi was dismissed and a written agreement was signed that no action should be begun against Lecardi. This on its face was simply *an agreement or a covenant not to sue.* The legal effect of such a covenant *is not the same as* that of a *release.*

"A covenant not to sue a sole tort feasor is, to avoid circuity of action, considered in *law a discharge,* and a bar to an action against such tort feasor. But the *rule is otherwise where there are two or more tort feasors,* and *the covenant is with one of them* not to sue him.

"*In such case the covenant does not operate as a release of either the covenantee or the other tort feasors* * * *"

* * * * *

"In fact, it was for the interest of the latter (the City) that appellee should receive part payment of her claim from LeCardi, and thereby reduce the amount of damages recoverable from it.

"The views we have expressed are sustained by the

following authorities: *Snow* v. *Chandler,* 10 N. H. 92; *Knapp* v. *Roche,* 94 N. Y. 329; *Bloss* v. *Plymale,* 3 W. Va. 393; *Sloan* v. *Herrick,* 49 Vt. 327; *Brown* v. *Marsh,* 7 id. 320; *Chamberlain* v. *Murphy,* 41 id. 110; *Ellis* v. *Esson,* 50 Wis. 138; **Parmelee v. Lawrence,** 44 Ill. 405."

The Babcock case is relied on and cited by many other Courts in the United States as settling the established law of Illinois which refuses to recognize a "release" in *tort* cases, where any contrary intention appears.

In the case at bar, the debenture holders **signed no release of any kind, technical or untechnical, seal or no seal. They signed nothing.**

They were only restrained from suing the banks.

In the Babcock case, the court expressly approved the rule that *in a tort case that no release will be effected of a joint tort feasor if the intention is otherwise.* This is exactly the same rule as the Parmelee case laid down in connection with joint obligors.

Therefore, in Illinois, the rule that an instrument will be construed only as a covenant not to sue applies equally to tort cases as well as to contract cases.

In *Adams* v. *Beckwith,* 100 Ohio Stat. 348, cited *infra,* the Court cited with approval and held that the Babcock case showed what the established law was in Illinois in tort cases. It relied squarely on the Babcock case.

In citing cases outside of Illinois in support of its rule the Supreme Court of Illinois adopted the holding of the followig cases:

In *Sloan* v. *Herrick,* 49 Vermont 327, that Court said, at page 328:

> "In actions of tort, *nothing less than* what in law is regarded a legal *satisfaction* of the tort by one joint tort feasor *will operate to discharge the other tort feasor. Neither the recovery of a judgment* • • • nor the *release of one on the receipt of part satisfaction for the tort,* when *it is expressed in the release*

that the sum paid is received *only in part satisfaction,* operates to bar the injured party from pursuing the other joint tort feasors for so much of the tort as remains unsatisfied."

Bloss v. *Plymale,* 5 W. Va. 393 and *Ellis* v. *Esson,* 50 Wis. 138, are to the same effect as the *Sloan* case.

In *Ellis* v. *Esson,* 50 Wis. 138 approved in the *Babcock* case (*supra*), *many* defendants cut away timber from plaintiff's land. One paid $200 and plaintiff covenanted not to sue him.

The evidence showed that plaintiff did not receive the money in full compensation but that he *intended to look to other wrong doers* for the balance.

The Court held that the contract of settlement was *no defense to the other wrong doers* since this was not a technical release under seal.

At page 102 the Court said:

"In other words, when the contract (of settlement) is *not of such a nature* that the law deems it *conclusive* evidence that the injured person has been *satisfied for the wrong,* then it becomes a question *of fact for the jury* whether * * * it was full satisfaction, and if it appears that it was not so received (in full satisfaction) it is only *pro tanto* a bar to an action against the other wrong doers.

"*And this view of the case, we think is sustained by the great weight of authority.* * * *"

At page 104 the Court said:

"That joint wrong doers are always held liable to the injured party severally as well as jointly."

And also at page 105 the Court said:

"*Certainly* the receipt of a partial satisfaction from one of two joint feasors *is no injury to the other* * * * who is afterwards sued for the trespass. On the other hand it is to *his benefit* as he has the advantage of what was paid by his associate in the wrong by reducing the judgment against him."

The Court further held that there is no difficulty in deciding whether compensation was in full where property was involved as it was subject of easy proof and computation.

(In our case the debenture holders lost everything, $57,000,000. They recovered only 7½%. On the record it is admitted that the debenture holders still are losers to the extent of $53,000,000.)

* • • • •

(Please Note. In our Brief in Support to the Petition for Writ of Certiorari we have already discussed and quoted from the other Illinois cases which support this section.)

The Circuit Court of Appeals in Our Case Overlooked and Refused to Follow the Established Law of Illinois as Interpreted by Its Own Court.

In *O'Shea* v. *N. Y. C. & St. L. R. Co.*, 105 Fed. 559 (C. C. A. 7th, 1901), a tort case, the Court held that parol evidence was admissible to show that the *release* was not intended to be in full satisfaction.

The Court held that even though the *release be under seal,* and where it appears that money was not received as full satisfaction for the injury, contradictory language (*e. g.,* words of release), in the instrument will be *disregarded,* and *it will be treated as a covenant not to sue.* Also that when a third party challenges the effect of the paper, **then both parties to the paper and the third party may introduce evidence concerning the instruction.** The Court further reversed the case for a trial by jury as to what the settlement contract really was.

The Court at page ..... said:

"The first part of the document recites it is for a sum of $1200.00 agreed upon in *full settlement of all*

claims, demands or *causes of action*, whatever, etc. * * *

"in *full settlement* for any and all injuries resulting from the document * * *

"in *full payment* of the above account 'in consideration of the payment of said sum' *a covenant never to sue the* * * * company upon any claim, etc. whether arising upon contract or upon tort."

The Court held:

"This document is an accord and satisfaction *coupled* with a *covenant never to sue* * * *

There are upon the face of the paper *certain indicia of an intention of O'Shea not* to accept the sum stated in full settlement of all claims and *causes of action* against the Burlington Co. there follows this expression: '*but not the New York, Chicago & St. Louis Railroad.*' * * *

"The agreement contains a general release * * *

"The *oral testimony* at the trial clearly established that it was *not intended by either party to the paper* that the sum of $1200 should be paid to O'Shea in full satisfaction of his injuries, that it *was not intended* by either party that the document which O'Shea was to sign should be *anything more than a covenant not to sue* the Burlington Company. In other words, the paper does not express the actual agreement of the parties. The question then arises whether such oral testimony was admissible * * *

"The court further said, quoting Greenleaf, that the rule which prohibits parol evidence to written instruments 'is applied only to suits between the parties to the instrument' * * *

"*it cannot affect third persons.*

"See, also, Whart. Ev. 92. In a suit between a party and a stranger, *neither is concluded* by the contract, but *either may give evidence* differing from it. *Lee* v. *Adsit*, 37 N. Y. 78; *McMaster* v. *Insurance Co.*, 55 N. Y. 222; *Yowell Mfg. Co.* v. *Safeguard Fire Ins. Co.*, 88 N. Y. 591; *Hankinson* v. *Vantine*, 152 N. Y. 20, 46 N. E. 292; *Iron Co.* v. *Green*, 31 C. C. A. 447,

88 Fed. 207; *Reynolds* v. *Magness*, 24 N. C. 30; *Dunn* v. *Price*, 112 Cal. 46, 44 Pac. 354.

"* * * *We think, that the rule of exclusion does not apply between a party to the contract and a stranger*, and improperly assuming that a joint tort feasor is a party to the contract.

"We are of opinion that the plaintiff in error *should have been permitted to show the real agreement*, and that the question *should have been submitted to the jury whether the written paper* expressed the actual contract of the parties. The *judgment is reversed*, and the cause remanded, with directions to award a new trial."

The above cases show that it was reversible error for Judge Briggle to reject the evidence contained in the Answer on the Facts (R. 230-268) and in the Offer of Proof (R. 239, Par. 56).

VIII.

PRACTICALLY ALL STATES REFUSE RELEASE TO WRONGDOERS IF INTENTION IS TO THE CONTRARY.

The Overwhelming Weight of Authority Holds That the Intent of the Parties Not to Release Joint Tort Feasors Will Be Given Effect, and They Will Not Be Released Regardless of the Language Used.

This is established by the Restatement of Torts (1939), Section 885, approved by the Circuit Court of Appeals at the case at bar. It states as follows:

"(1) A valid release of one tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, *unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document.*"

In its "Comment", the Restatement, in referring to the old rule which discharged others irrespective of the intent of the parties, states:

> "It frequently resulted in the unintended and unpaid-for discharge of one of the tort-feasors. The rule is not consistent with the modern American point of view."

The leading cases from other jurisdictions are as follows:

Steenhuis v. *Holland*, 217 Ala. 105, 115 So. 2 (1927).

Mahaffey v. *Glover*, 184 Ark. 1159, 45 S. W. 2d 521.

American Nat. Bk. v. *Duer*, (Cal.) 117 Pac. 2d 405 (1941)

Kinchloe v. *Retail Credit Co.*, (Cal.) 46 Pac. 2d 971 (1935).

Cowles v. *Independent El. Co.*, 22 Cal. App. 109, 70 Pac. 2d till (1937).

Dwy v. *Connecticut*, 89 Conn. 74, 92 Atl. 883.

Balick v. *Phila. Dairy Prod. Co.*, 35 Del. 269, 162 Atl. 776 (1932).

Parry Mfg. Co. v. *Crull*, 56 Ind. App. 77, 101 N. E. 756 (1914).

Ryan v. *Becker*, 111 N. W 426 (Iowa, 1907).

Snyder v. *Mutual Tel. Co.*, 135 Iowa 215, 112 N. W. 776 (1907).

Edens v. *Fletcher*, 79 Kan. 139, 98 Pac. 784.

City of Topeka v. *Brooks*, 99 Kan. 643, 164 Pac. 285.

Feighley v. *Hoffman*, 100 Kan. 430, 165 Pac. 276.

L. & E. Mail Co. v. *Barnes*, 117 Ky. 860, 79 S. W. 261 (1904).

Landry v. *New Orleans Pub. Serv.*, 177 La. 105, 147 So. 698 (1933).

Hale v. *Spaulding*, 14 N. E. 534 (Mass.).

Matheson v. *O'Kane*, 211 Mass. 91, 97 N. E. 638 (1912).

American Rwy. Exp. Co. v. *Stone,* (C. C. A. 1, 1928) 27 F. 2d 8 (Mass.).

Murphy v *Penniman,* 66 Atl. 828 (Md., 1907).

Cook v. *City Transp. Co.,* 272 Mich. 91, 261 N. W. 257 (1935).

Slinkard v. *Nat'l. Mach. Co.,* 274 Mich. 662, 265 N. W. 494 (1936).

Joyce v. *Mass. R. E. Co.,* 173 Minn. 310, 217 N. W. 337 (1928).

Gulf Ref. Co. v. *Ferrell,* 165 Miss. 296, 147 So. 476 (1933).

McKim v. *Metropolitan St. Ry. Co.,* (Ct. of App. Mo.) 196 S. W. 433 (1917).

Black v. *Martin,* 88 Mont. 256, 292 Pac. 577.

Fitzgerald v. *Union Stockyards Co.,* 89 Neb. 393, 131 N. W. 612 (1911).

Carpenter v. *McElwain,* 78 N. H. 118, 97 Atl. 560.

Colby v. *Walker,* 86 N. H. 568, 171 Atl. 774.

Roseville Trust v. *Mott,* 85 N. J. Eq. 297, 96 Atl. 402.

LaMonte v. *Lurich,* (N. J.) 100 Atl. 1031.

Gilbert v. *Finch,* 173 N. Y. 455, 66 N. E. 133.

Adams Exp. Co. v. *Beckwith,* 100 Ohio St. 348, 126 N. E. 300.

Bland v. *Lawyer-Cuff Co.,* 72 Okla. 128, 178 Pac. 885.

Baldwin v. *Ely,* 127 Pa. Sup. 110, 193 Atl. 299 (1937).

Insuranceshares Corp. v. *Northern Fiscal Corp.,* (D. C. Pa., 1940) 35 F. Supp. 22.

In *Carey* v. *Bilby,* (C. C. A. 8) 129 Fed. 203 (a tort case), where the Court held that *effect must be given to a reservation in a release.* At page 205, the Court said:

"We are of the opinion that the doctrine enunciated in the cases last cited is supported by the *greater*

weight of authority, and is founded upon the better reasons.

"It has the merit of giving *effect to the intention of the party* who executes such an instrument, *which should always* be done when the intention is manifest and it can be given *effect without* violating any rule of law, morals, *or public policy.*

"Besides we are not aware of any sufficient reason which should *preclude* a person who has sustained an injury through the wrongful act of several persons from *agreeing* with one of the wrongdoers, who desires to *avoid* litigation, to accept such sum by way of *partial* compensation for the injury as he may be willing to pay, and to *discharge* him further from liability without *releasing* his cause of action as against the other wrongdoers.

"The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor."

In *Adams* v. *Beckwith,* 100 Ohio St. 348, 176 N. E. 300, 1919, the plaintiff gave covenants not to sue to two railroads expressly reserving her rights against the Adams Express Co. The latter *contends this was a release of* joint tort-feasors and therefore should release it also, *relying on Ellis* v. *Bitzer,* 2 Ohio 89, 15 Am. Dec. 534.

The Court said:

"A decided case is *worth as much as it weighs in reason and righteousness, and no more.* It is not enough to say 'thus saith the court.'

"Now, where it is charged that two or more persons have committed a wrong against another, the question arises, *may one of these persons buy his peace,* settle all claims for damages made against him, solely for his own benefit and his own release, leaving or reserving all questions as to the liability of others for independent and later determination? *Why not?* What principle of law, of reason or righteousness, what primary element of justice, is violated by such a proceeding, save the dictum of some court?

And at page 302:

> "Upon what principle the court (*Ellis* v. *Bitzer*) took a contract between the parties, which was in *plain, definite,* and *unambiguous* terms, and wrote into that contract not only what it *did not contain* but what the contract expressly said it should not contain, is beyond understanding. It emphasizes the importance of a release without a complete satisfaction and *extinguishes* a right without such satisfaction.
>
> "There is neither *reason, rhyme, nor righteousness in such a course of reasoning,* if it *may be called reasoning at all.* There is nothing peculiar or exceptional about contracts of release, or contracts not to sue, or contracts to cease prosecuting a suit. They are presumably to be construed, if in doubt, by the same rules of arriving at the intention of the parties as any other kinds of contract.
>
> "But courts *unfortunately have too often* not only disregarded the intention of the parties in such kinds of contracts, but have made new contracts for the parties squarely contrary to what the parties themselves intended. The *Bitzer* case is therefore disapproved."

And also at page 302:

> "The parties themselves reserved the right to sue the Adams Express Company. **It is an odd species of legal legerdemain whereby a court can destroy that reservation,** that plain provision in the agreement of the parties."

At page 302, the Court remarked that "it is of interest to note that at least *two other courts* of last resort have announced and followed the *more humane* and *reasonable doctrine,*" and then proceeded to quote at length the syllabus from the *Connecticut* case of *Dwy* v. *Connecticut Co.,* 89 Conn. 74, 92 Atl. 883, and from the *Illinois* case of *City of Chicago* v. *Babcock,* 143 Ill. 358, 32 N. E. 271. With reference to the *Dwy* case, the Court said, at page 303:

> **"The doctrine here announced is so sensible and**

salutary that it is hard to understand how any court intent upon justice could follow any other rule.

"His line of reasoning is not unlike that of the immortal J. N., who used to insist upon special rates and privileges at the hotels. It was said that upon numerous occasions he induced the landlord by his persuasive art to reduce the bill one-half, whereupon he would reply 'I shall not be outdone by your generosity, and I shall therefore throw off the other half'."

It will thus be seen that the highest Court of Ohio believed that the case of *City of Chicago* v. *Babcock* (*supra*), also a tort case, is authority for the established law of Illinois in *tort cases* which we contend for.

This, Adams, case appears to be squarely on all fours with practically every crucial legal question in the case at bar.

Its holdings are just plain common sense.

In Michigan, at the time of the decisions cited by defendants, not even *a covenant not to sue* was recognized. However, in 1935, in the case of *Cook* v. *City Transportation Company*, 272 Mich. 91, that state also joined the ranks of those following the modern view of giving effect to the intention of the parties. At page 220, the court said:

"The *distinction* between a release and an agreement not to sue *is fine spun and seems overtechnical.* However, the whole law of joint tort-feasors is of *like character* and, as indicated by Mr. Justice Potter, the *overwhelming weight of authority draws the distinction* and denies the effect of an agreement not to sue one as a release of other joint tort-feasors. * * *

"I think we should follow *the weight of authority*, not because I approve *the distinction, except as a mental exercise*, but *because* such effect of an agreement not to sue *offers a way for a party to buy his peace* and allows an opportunity to compromise a doubtful claim without requiring an injured party to forego

the right of full compensati ion against *known wrong-doers.*" (Italics supplied.)

This case therefore overrules the Michigan cases cited by the defendants.

Respondents' Citations Are U nsound and Inapplicable in a Court of Equity.

Citations Distin guished.

Respondents devote themselve s to spurious argumentation based on unsound, harsh, anomalous, overruled or ancient common law decisions (or dicta) found in nine states outside of Illinois, in the past 100 years. These common law cases bear no apt re semblance to the situation, or to the facts here.

By collecting such citations e n masse, multiplying and magnifying them by constant re petitions, and adding the result, it is asserted, that respond ents "are fully supported by the established law and soun l logic;" (Resp. Brief, p. 12, 21 et seq.)

We respectfully submit that such citations are contrary to the overwhelming wei ght of present authority. They are contrary to the more enlightened principles of equity and law that now prevail in Illinois and in 47 other states, and in the federal courts.

Defendants are absolutely wr ong in claiming that the ancient theory on which they re ly is followed in the majority of American jurisdictions. The contrary is shown in the Restatement of Torts, (19 39) Section 885, which is referred to with approval by the Court of Appeals in the case below.

> "(1) A valid release of o ne tort-feasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document unless such agreement appears in the document."

In the case at bar there was no "Release Document." The Reservation was part of the Agreement; it was expressed and embodied in the Petition for Decretal Order, in the Notice to Debenture Holders, in the letters of explanation to them, and in the Findings of Fact and in the Decree which referred to it.

In none of the cases cited by respondents was there (1) *any evidence of any reservation* or (2) *any evidence of any intention of the parties not to release others,* or (3) an affirmative showing that full compensation had not been paid to the releasor.

IX.

THERE IS NO CASE IN ILLINOIS RELEASING A JOINT TORT-FEASOR, WHICH CONTAINED ANY RESERVATION OF THE CHARACTER IN THIS CASE.

There is no case in Illinois to release a joint tort-feasor or joint wrongdoer in any case remotely resembling the case at bar.

Vigent v. *Scully,* 35 Ill. App. 44 is the principal case relied on by the respondents. They cite and quote it over and over again,—six times. It has absolutely no application here, since it appeared that the injured party had received full satisfaction.

No question of intention *not to* release, was involved in the case.

The Vigent case relies on *Ellis* v. *Bitzer,* 2 Ohio 89. That case has also been expressly overruled in Ohio.

Stanley v. *Leahy,* 87 Ill. App. 465 has been completely distinguished as wholly inapplicable in our supporting brief to Petition for Certiorari, pages 28 and 29.

There was no evidence of any intention by both parties to reserve any other cause of action.

In *Brown* v. *Cambridge*, 85 Mass. 474, the plaintiff gave a formal written release *without* any reservation.

The Massachusetts rule recognized reservation and in the *Brown* case held there was insufficient evidence thereof.

However, the *Brown* case does hold that if *there had been a reservation or evidence of any intention to reserve*, the other joint tort-feasor would not have been discharged.

This holding of the *Brown* case as standing for the doctrine that, under such circumstances, there *would be no release* of a joint tort-feasor is approved in *American Ry. Express Co.* v. *Stone*, decided June 28, 1928, 27 Fed. (2d) 8. That case cites *Brown* v. *Cambridge* as well as *Muse* v. *Vito*, 243 Mass. 384 (another case relied on by respondents as holding the following proposition):

> "The decisions of the Supreme Judicial Court of Massachusetts hold that a release, although not under seal, gives to one joint tort-feasor discharges all, provided it is absolute and unconditional, and is *not simply a covenant not to sue the party released, and there is no evidence of a reservation to sue other joint tort-feasors.*" (Italics ours.)

Ellis v. *Bitzer*, 2 Ohio 89 is cited in *Vigent* v. *Scully*, 35 Ill. App. 44 only under the general proposition of a release of one and all. *Ellis* v. *Bitzer* is not the present law in Ohio, as it has been expressly overruled in *Adams Express Co.* v. *Beckwith*, 100 Ohio St. 348, 126 N. E. 300, discussed *supra*.

Petroyeanis v. *Pirola*, 205 Ill. App. 310 was overruled in effect by the later case of *Van Meter* v. *Gurney*, 251 Ill. App. 184 involving substantially similar facts.

The *Van Meter* case was based upon *Parmelee* v. *Lawrence*, 44 Ill. 415, and the cases following it.

In the *Van Meter* case the Court uses this language: "it requires some *artificiality in reasoning to avoid giving effect to the intention of the parties* in the instant case, where this intention is expressed as clearly as language is capable of expression."

Conclusion.

Defendants have failed to show any valid reason why certiorari should not be granted.

This case is limited to the questions arising under the erroneous summary judgment which defendants obtained under Rule 56. The additional grounds urged by defendants have no application to that summary judgment which adjudicated only that plaintiffs are barred from maintaining this suit because of the so-called bank settlement.

It is clear that the decision of the Circuit Court of Appeals conflicts with the established Illinois law and equity which governs.

We respectfully and humbly repeat the Prayer of Our Petition.

Respectfully submitted,

Edmund D. Adcock,
Lewis F. Jacobson,
Roger Q. White,
Counsel for Plaintiffs-Petitioners.

(17)

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 822

DE MET'S INCORPORATED AND ROBERT E. WOOD,
Petitioners,

vs.

SAMUEL INSULL, JR., C. W. SILLS, H. L. STUART, STANLEY FIELD, EDWARD J. DOYLE, F. K. SHRADER AND JOHN H. GULICK,
Respondents.

REPLY TO RESPONDENTS' ANSWERS TO PETITION FOR WRIT OF CERTIORARI.

EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
33 N. La Salle St.,
ROGER Q. WHITE,
1 N. La Salle St.,
GEORGE F. CALLAGHAN,
105 W. Adams St.,
ALBERT W. FROEHDE,
77 W. Washington St.,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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REPLY TO RESPONDENTS' ANSWERS TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents say the petitioners have not made an accurate statement of the case, but they do not point out wherein the petitioners' statement is inaccurate.

The respondents say that the complaint in *Gregory* v. *Continental Bank* (R. 58-104), in which action in equity the settlement with the banks was consummated, includes "all the charges against the former directors of Corp. which are made in the complaint at bar, and many more." The former directors of "Corp." (Corporation Securities Co. of Chicago) were not, and could not have been, parties to

that suit, and no relief was, or could have been, sought against them in that suit.

This is an action to recover damages from the directors of Corporation Securities Co. of Chicago, for causing the corporation to pledge all of its assets as collateral security for loans from banks in breach of covenants contained in the Corporation Serial Gold Notes held by the plaintiffs and all others similarily situated.

All that was sought in the *Gregory* case, which was an action in equity, was to recover the collateral pledged with the banks in the Fall of 1930 and the Spring of 1931, or at least to permit the Serial Gold Noteholders to share with the banks in the security of this collateral.

The complaint against the Continental Bank, after stating historical and evidentiary facts to show knowledge by the bank of the rights of the Noteholders by virtue of the covenants in the Serial Gold Notes, prays (R. 95-96):

> "(e) That an accounting should be taken by this Court * * * and that said defendant be decreed to have received said stocks, dividends and accretions with knowledge of the provisions of and in violation of the provisions of the aforesaid Serial Gold Notes * * * and that said defendant may be decreed to surrender * * * such stock, dividends, accretions and assets as shall upon the taking of said accounting, appear to be due and deliverable * * * and to constitute the security for said Serial Gold Notes."
>
> "(f) That said stocks, or the value as aforesaid, be decreed to be subject to a preferred lien and/or to be an equitable trust fund for the benefit of the holders and owners of said Serial Gold Notes."

The complaint against the bank prays also for an injunction against the sale or other disposition of said securities. The complaint did not pretend to seek any relief for the wrong committeed by the directors in inducing breach of the covenants in the Serial Gold Notes. The recitals of

fact in the complaint, referred to by defendants, obviously are to establish notice on the part of the bank in support of the complainant's claim of an equitable right to and interest in the collateral pledged with the bank.

All other matters appearing in Respondents' Answers have been fully met in petitioners' brief in this case. Petitioners here adopt as their further reply to Respondents' Answers the Reply filed by the petitioners in *Aiken* v. *Insull*, No. 823.

Respectfully submitted,

EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
ROGER Q. WHITE,
GEORGE F. CALLAGHAN,
ALBERT W. FROEHDE,
Counsel for Petitioners.

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Office Supreme Court U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

THOMAS D. AIKEN, et al., Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	**No. 821**
DE MET'S INC. and **ROBERT E. WOOD**, Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	**No. 822**

ON PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOINT PETITION OF PETITIONERS FOR A REHEARING and ALTERNATIVE MOTION TO WITHHOLD FINAL RULING PENDING FURTHER PROCEEDINGS, ETC.

EDMUND D. ADCOCK,
33 North LaSalle Street,
Chicago, Illinois,
LEWIS F. JACOBSON,
33 North LaSalle Street,
Chicago, Illinois,
ROGER Q. WHITE,
120 South LaSalle Street,
Chicago, Illinois,
ALBERT W. FROEHDE,
77 West Washington Street,
Chicago, Illinois,
GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago, Illinois,
Counsel for Plaintiffs-Petitioners.

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DE MET'S INC. and **ROBERT E. WOOD**, Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	No. 822

ON PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOINT PETITION OF PETITIONERS FOR A REHEARING

and

ALTERNATIVE MOTION TO WITHHOLD FINAL RULING PENDING FURTHER PROCEEDINGS, ETC.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petition for Rehearing.

Now come the above named plaintiffs-petitioners in each of said cases* and jointly petition this Honorable Court for a reconsideration of the orders of February 16, 1942, denying their respective Petitions for Writs of Certiorari to the Circuit Court of Appeals for the Seventh Circuit, and petitioners respectfully pray this Honorable Court to vacate said orders of February 16, 1942, to grant a rehearing and to grant the Writs of Certiorari as prayed in their petitions.

Alternative motion to withhold final ruling pending further proceedings, etc.

In the alternative, plaintiffs-petitioners move this Court to recall its mandate and withhold for at least ninety days the final disposition of said Petitions for Writ of Certiorari pending the disposition of proceedings to be instituted forthwith by plaintiffs-petitioners in the District Court in the so-called bank cases to correct the settlement decrees entered therein, etc., all as more fully described on pages 15 to 20 hereof.

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* Inasmuch as the plaintiffs-petitioners in the DeMet's case (No. 822) adopted the Petition for Writ of Certiorari in the Aiken case (No. 821), the questions involved being practically identical, this petition is being filed jointly by the plaintiffs-petitioners in both cases.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

A clear understanding of the simple question presented by the Petitions for Writ of Certiorari filed in cases Nos. 821 and 822 was undoubtedly prevented by the numerous cross-petitions and briefs filed in cases Nos. 823, 824 and 827, and presented to the Court together with the petitions and briefs filed in these two cases. The cross-petitions and briefs filed in those three cases have no bearing on the instant petitions in cases Nos. 821 and 822.

Petitioners are the plaintiffs in two class suits and represent 17,000 debenture holders of Insull Utility Investments, Inc. (I. U. I.) (Case No. 821) and 5,000 note holders of Corporation Securities Co. (Case No. 822), who are scattered throughout the United States. Petitioners take this last opportunity, afforded by Rule 33 of this Court, to obtain justice in behalf of themselves and the class they represent and respectfully ask this Court to give further consideration to an extraordinary situation which clearly calls for the exercise of this Court's jurisdiction.

In a number of instances, upon the filing of petitions for rehearing, this Court has seen fit to re-examine petitions for certiorari previously denied, to vacate its previous orders and thereupon to grant certiorari where the ends of justice require it. (Roberston and Kirkham, "Jurisdiction of the Supreme Court of the United States" (1936), Sec. 288, note 68, and cases cited.)

In *United States* v. *Boston Insurance Co.*, 269 U. S. 197, where this Court, on petition for rehearing, reversed its previous ruling, this Court said, in the course of the opinion:

> "Upon a re-examination of the record it becomes plain that we misapprehended the opinion and ruling of the lower court; also that the reason advanced to support our conclusion is insufficient. * * *"

Resumé of essential facts reveals that the expressed intention of the settling parties in the bank cases was to preserve the causes of action against directors which is the subject matter of the instant suits.

A statement of the essential facts appears on pages 1 to 7 of the Petition for Certiorari in case No. 821 and pages 1 to 5 of the Petition for Certiorari in case No. 822.

The respective directors of the two companies in question, defendants in these two cases, caused their companies to issue and sell to the public (including plaintiffs) large amounts of unsecured obligations; two series of debentures aggregating $66,000,000 by I. U. I. and serial gold notes aggregating $35,000,000 by Corporation Securities Co. Both of these corporations were investment trusts, whose purpose was to buy and hold securities of Insull operating companies with which defendants were also connected. These debentures and notes each contained covenants prohibiting the pledging by the companies of any of their property unless the debentures and notes were equally and ratably secured by the instruments of pledge. (Aiken R. 3-16; De Met's R. 3-11.)

Notwithstanding these covenants, the defendant-directors caused to be pledged virtually all the assets of the corporations to certain Chicago and New York banks as

security for loans and caused the covenants to be breached by failing to provide any security whatever for the debentures and notes. (Aiken R. 24-33; De Met's R. 10-11.)

After these corporations went into bankruptcy in 1932, the debenture holders and note holders each filed two sets of suits, one against the banks and the other against the directors. The suits against the banks charged the banks with notice of the covenants and sought equitable relief to require the banks to share their security with the debenture holders as required by the covenants in the debentures and notes. (Aiken R. 6; 12, 86-114, 124; De Met's R. 106-110.)

The litigation against the banks was terminated by an oral agreement between the representatives of the plaintiffs and the banks, subject to the approval of the Court, under which the banks paid into court a sum which yielded about four cents on the dollar to the debenture holders and note holders. The debenture holders and note holders did not execute any written instrument of settlement. The termination of the bank litigation was accomplished by the decrees and orders entered by the District Court at Chicago, after notice to the members of the class and hearing, whereby the Court approved the settlement, on the terms and conditions set forth in its findings of fact, as fair and equitable, and permanently enjoined the further prosecution of the suits. (Aiken R. 136-138, 232-239, 143, 144, 148-162, 115-199, 170-173; De Met's R. 125, 239-242.)

Of paramount importance to the cases at bar is one of the conditions of the agreement of settlement, made a part of the findings of the Court in the bank cases, that nothing contained in the agreement should be construed to operate as a release or to affect any cause of action

of the debenture holders and note holders against the directors (defendants in the instant suits). (Aiken R. 143, 166; De Met's R. 131.)

The instant suits against the directors, which were pending at the time of the so-called settlement with the banks and before the same Judge of the District Court who entered the orders in the bank cases, seek an accounting and damages against the defendant-directors for causing the corporations to violate the covenants of the debentures and notes. (Aiken R. 2-39; De Met's 2-16.)

After the so-called settlement with the banks was consummated, the defendant-directors filed motions for summary judgment for the defendants (under Rule 56) on the ground that the so-called settlement with the banks constituted a release of the banks and automatically operated to release the defendant-directors on the theory that the banks and the defendant-directors were joint tortfeasors. (Aiken R. 74-195; De Met's R. 56.) The plaintiffs filed verified answers, the allegations of which were admitted by the defendants. These answers set forth the negotiations and the oral agreement between the representatives of the debenture and note holders and the banks, the intention of the plaintiffs and the banks not to release the directors and the intention of the parties to give the banks no more than a covenant not to sue and further stated that the reservation clause was inserted for the purpose of evidencing that intention. The plaintiffs' answers further alleged that the payment by the banks and all the dividends paid to the plaintiffs in the bankruptcy case yielded less than 10% of the principal amount of debentures and notes and that the plaintiffs had not received full satisfaction for the injuries sustained by them as the result of the wrongful acts of the defendants.

(Aiken R. 229-241, 279, 281, 289; De Met's R. 239-245, 271-274, 285-288.)

The District Court granted the summary judgments barring plaintiffs from further maintaining these suits against the directors and the Circuit Court of Appeals affirmed the judgments. (Aiken R. 320, 364; De Met's R. 316, 359.)

I.

The fundamental question involved is whether the established Illinois rule that so-called releases must be construed to carry out the expressed intention of the parties, is limited to contract liability and does not apply to tort liability.

The only controversy involved is whether the Circuit Court of Appeals correctly held, under Illinois law, that the so-called settlement with the banks of their liability for having accepted the pledges bars further suit against defendants for having induced the wrongful pledging.

While ten questions are enumerated in our Petition for Writ of Certiorari (Aiken Pet. pages 7-10), the principal question is:

Under Illinois law, assuming that the banks and director-defendants were joint tort-feasors, did the so-called settlement with the banks in consideration of part payment, operate to discharge the director-defendants also, in spite of the fact that it was the intention of both settling parties that it would not have that effect, and that such intention was expressed in a written reservation which was a condition of the so-called settlement? (Questions 1-3, 9-10, Aiken pet. pp. 9-10.)

The Illinois law on the point is as follows:

1. The Supreme Court of Illinois in 1867 held, in a case involving release of joint debtors (*Parmelee* v. *Lawrence,* 44 Ill. 405), that releases, like all other written instruments, must be construed according to the intention of the parties, and where the intention of the parties not to release others jointly liable is expressed as a proviso of the release, such intention must be given effect. That Court further held that in order to give effect to the intention of the parties, in a suit against the others, the release shall be construed as if it were only a covenant not to sue, leaving the rights of the parties to the release unimpaired, except for the obligation of the releasor not to assert any further claims against the releasee. In that case the court specifically overruled the earlier Illinois cases which refused to give effect to the proviso on the ground that it was repugnant to the release. (Aiken pet. pp. 21-22.)

2. In all the numerous cases subsequent to 1867 involving contract liability, both the Supreme Court of Illinois and the Appellate Court of Illinois have followed the principle laid down in *Parmelee* v. *Lawrence.* (Aiken pet. pp. 22-23.)

3. Neither in the *Parmelee* case nor in any of the subsequent cases did the courts indicate that the principle was limited to contract cases only.

4. The rule of the *Parmelee* case was specifically held to be applicable to tort situations in two Illinois cases.

In the case of *City of Chicago* v. *Babcock,* 143 Ill. 358, 367, involving the question whether the payment of a sum of money by one of several *joint tort-feasors,* in consideration of an agreement not to sue further constituted, in view of surrounding circumstances, an accord and

satisfaction, the Supreme Court of Illinois discussed the subject of the law of release of joint tort-feasors at considerable length. In that case the Supreme Court of Illinois held that the intention of the parties was controlling and stated that among the cases supporting the views which it expressed is *Parmelee* v. *Lawrence,* 44 Ill. 405.

In the case of *Van Meter* v. *Gurney,* 251 Ill. App. 184, the Court relied on the *Parmelee* case in holding that a release given to one of two *joint tort-feasors* after judgment, did not release the other where the instrument contained a reservation of the right to proceed against the other.

II.

The independent judgment of the Circuit Court of Appeals was that effect should be given to the expressed intention to preserve the cause of action against the defendant-directors. The conflict between its decision and the local law results from a plainly mistaken belief by the Circuit Court of Appeals that the Illinois Courts have refused to apply the Parmelee principle in tort cases.

The decision of the Circuit Court of Appeals cannot be justified as a permissible decision predicated on an absence of applicable local decisions, as was involved in *MacGregor* v. *State Mutual Life Assurance Co.,* 86 Law Ed. Advance Opinions, page 559. On the contrary, the opinion of the Circuit Court of Appeals plainly indicates that (in the absence of applicable local decisions) *if the question had been left to that court to decide according to its own independent judgment, it would have given effect to the reservation.*

The Circuit Court of Appeals characterized the so-called rule that the release of one joint tort-feasor releases all irrespective of the intent of the parties as a "technical" and "harsh rule". The court described the formula of the *Parmelee* case as "this wholesome and common sense formula" and as "the superior view". The court expressly stated that it saw no good reason for drawing a distinction between joint tort-feasor cases and joint debtor cases. It appears therefore that if the situation in the case at bar is considered as if there were a complete absence of Illinois decisions on the question as to whether the *Parmelee* rule is applicable in tort cases, then the Circuit Court of Appeals would have reversed instead of affirmed the decision of the District Court. (Aiken R. 356, 357.)

The burden of our petition is that while the Circuit Court of Appeals recognized that it was its duty to follow the local law, it made a serious mistake in appraising the data with respect to the Illinois law. The mistake of the Circuit Court of Appeals was that it misapprehended the holding in three Illinois cases (hereinafter discussed) upon which it relied, in concluding that while the *Parmelee* rule ought to apply in tort cases, the Illinois courts have limited that formula to contract cases and have refused to extend it to tort cases, and that in tort cases a release of one releases all irrespective of the intent.

There is no room for difference of opinion as to what the three cases relied on by the Circuit Court of Appeals actually held. They are not even germane. In none of them was there involved a release of one with a reservation as to the others. In none of them is that subject discussed. In none of them was there involved the question as to the expressed intention of the parties. The

three cases involve only the application of the general rule of release in respect to an ordinary unqualified release. There is every inference in the three cases that if they contained the factors involved in the instant cases, the decisions would have been different. The task of this Court will simply be to determine whether the Circuit Court of Appeals properly construed these three cases. We will again discuss these three cases briefly.

In *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, there was no written instrument and there was no reservation of the cause of action against the other joint tort-feasor. The Court held that the other joint tort-feasor was discharged because the only evidence in the record was oral testimony that payment had been received in full satisfaction from one of them and there was no evidence to negative the implication of a complete accord and satisfaction. The Court specifically stated that if there was a contrary intent, the burden was on the releasor to produce evidence thereof.

In *Gilbert* v. *St. Louis R. R.*, 220 Ill. App. 51, the Court merely held that a formal written release containing no qualifications also discharged joint tort-feasors.

In *Stanley* v. *Leahy*, 87 Ill. App. 465, the Court held that a replication to a plea of release was demurrable where it stated merely that the releasor did not intend an unqualified release of one to release the others. That statement in the replication was obviously only a self-serving statement since it failed to state that the intention was expressed in the release agreement. The holding in that case does not mean that a different rule is applied in tort cases from contract cases because even in contract cases following the *Parmelee* rule, the Illinois courts hold that an unexpressed intention to reserve

a cause of action against others has no effect. (*Clark* v. *Mallory*, 185 Ill. 27.)

This illustrates how mistaken the Circuit Court of Appeals was in believing that the Illinois courts have refused to apply the *Parmelee* rule to tort cases.

It is plain that the Circuit Court of Appeals misapprehended these three cases. There is no case in Illinois which supports the Court's erroneous holding as to the Illinois law. Since the Circuit Court of Appeals reluctantly affirmed the decision of the District Court only because of its mistake as to those three cases, this Court should grant certiorari so as to correct the error and prevent the confusion as to Illinois law resulting therefrom.

III.

Practical considerations of great importance in the administration of justice require a review by this Court to settle the conflict between the decision of the Circuit Court of Appeals and the Illinois law.

The effect of the decision of the Circuit Court of Appeals is to create a direct conflict with *Parmelee* v. *Lawrence*, 44 Ill. 405, as approved by the Illinois courts in tort cases. (*City* v. *Babcock*, 143 Ill. 358, and *Van Meter* v. *Gurney*, 251 Ill. App. 184.) Therefore, parties in Illinois in considering the validity of a release of one of several joint tort-feasors with a reservation as to the others, will not know whether to rely on the doctrine of *Parmelee* v. *Lawrence*, as approved in *City* v. *Babcock*, and *Van Meter* v. *Gurney*, *supra*, or whether to rely on the decision of the Circuit Court of Appeals. This presents a very serious situation which this Court

has repeatedly held to be ground for certiorari in order to resolve the conflict.

In *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 85 Law ed. 139, this Court described questions concerning conflict between a Court of Appeals and a State Court on local questions as "questions of public importance concerning the interrelation of State and Federal Courts" (p. 143).

In *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 Law ed. 109, this Court said at page 114:

> "The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of State law for litigants in the State Courts and another rule for litigants who bring the same question before the Federal Courts owing to the circumstance of diversity of citizenship."

In the proper administration of justice it is highly important for this Court to review the case at bar, not merely because of the general importance of establishing a uniform rule of State law whether the question is in the State Courts or in the Federal Courts, but in the case at bar there are "practical aspects" which enhance the importance of resolving the present conflict, namely:

(1) The effect will be disastrous on the rights of the 22,000 claimants in these suits who relied on the local law as interpreted by the settling parties and by the United States District Court which approved the bank settlement with the reservation as a condition. These parties are now deprived of one of the considerations for their acceptance of the settlement with the banks and are deprived of a benefit expressly provided in their agreement and confirmed to them in the decree of the trial judge in the bank settlement proceedings.

(2) Unless this Court reviews the case and settles the question, the decision of the Circuit Court of Appeals will have the effect of unsettling the Illinois law, and of discouraging the use of the form in question so that it will be unlikely that the Illinois Courts will ever have the opportunity to settle the question. The result will be that this wholesome and common sense method of compromise will be discouraged in tort cases purely because of a plain mistake of the Circuit Court of Appeals.

In view of the decision of the Circuit Court of Appeals plaintiffs in tort cases in Illinois would in the future be unwilling to rely upon the *Parmelee* doctrine as approved in the *Babcock* and *Van Meter* cases, because they would be fearful that if the release should be presented to a Federal Court upon grounds of diversity of citizenship, the Federal Court would follow the decision of the Circuit Court of Appeals in this case.

Furthermore, the decision of the Circuit Court of Appeals, coupled with the refusal of this Court to grant certiorari, would obviously deter the use of this form of release even though parties desiring to use it realized that it was still in the power of the Illinois courts to abrogate the effect of the decision as a precedent. The result of this uncertainty would be that the form of release under discussion would not be used in tort cases and therefore there would never be any likelihood of the Illinois courts passing upon the question. In that way what has appeared to be the rule in Illinois since 1867 will have been nullified and the "wholesome and common sense formula" discarded in tort cases.

Thus confusion and misapprehension must result and compromises probably discouraged unless the conflict is reconciled or abated by this Court.

ARGUMENT IN SUPPORT OF ALTERNATIVE MOTION TO RECALL MANDATE AND WITHHOLD RULING PENDING DISPOSITION OF FURTHER PROCEEDINGS IN DISTRICT COURT IN THE SO-CALLED BANK CASES.

The decision of the District Court and the affirmance of that decision by the Circuit Court of Appeals are based on the conclusion that the language of the decree approving the settlement of the bank litigation constituted a release of the banks rather than a covenant not to sue them; and that the clause purporting to give it the effect of a covenant not to sue and preserve the cause of action against directors was repugnant to such release and could be given no effect. It was conceded that if the language of the decree provided for no more than a covenant not to sue, it would not operate to release the defendant-directors. It was only because the lower courts in the instant suits against the directors construed the decrees in the bank cases to constitute releases that they decided that the defendant-directors were also released.

The sworn Answer on the Facts filed below (Aiken R. 229-239) and the affidavit of counsel attached hereto make it clear that in making the settlement it was the intention of the parties to the settlement, that is, the representatives of the debenture and note holders and the banks, merely to terminate the litigation against the banks and not to release them. It was the agreement and intention of the settling parties that the decree submitted to and approved by the court should not release the banks and should only have the effect of a covenant not to sue so as to preserve the cause of action against the directors. This was also the intention of Judge Wilkerson, Judge of the District Court at Chicago, who approved the settlement. Judge

Wilkerson approved the settlement as fair and equitable on the conditions stated in the settlement petition and his Findings of Facts, one of which was that nothing therein contained or referred to should be construed to operate as a release or to affect the cause of action against the directors. (Aiken R. 143, 166; De Met's R. 131.) Judge Wilkerson could not have found the settlement fair and reasonable to the debenture and note holders had he considered that the language reserving the cause of action against the directors constituted mere words having no meaning or value.

The decisions below in these suits against the directors indicate that, in the opinion of those courts, despite the care exercised by the parties and the court in the bank cases in the wording of the decree so as to express the intention of the parties to preserve the cause of action against the defendant-directors, the proper technical words were apparently not used to effect the intention of the parties. If the language in the settlement decree and collateral papers were revised so as to more fully and accurately express the intention of the parties, it would become obvious and beyond any possible doubt that the District Court in the bank settlement cases did not decree and did not intend to decree anything which could be construed to release the directors and would establish that the plaintiffs have retained their cause of action against the defendant-directors.

There can be no question about the intention of the parties. It is absurd to believe that Judge Wilkerson, in approving the settlement with the banks in a class suit filed in behalf of all creditors, inserted in the settlement decree and findings a clause, as a condition to

his approval of the settlement, reserving the cause of action against the directors *without intending that that clause should be given effect.* On the contrary, it must be evident that the plaintiffs and Judge Wilkerson would not have approved the settlement with the banks had it not been for the conditions that the debenture and note holders would still have the right to prosecute their suits against the director-defendants. A proposal by the banks which would have discharged the defendant-directors was rejected by the representatives of the debenture and note holders unless the directors would pay a substantial sum in addition to that to be paid by the banks. This they refused to do. (Aiken R. 236-237, Pars. 43-49.)

The construction placed by the lower courts in these cases on the settlement decree and findings in the bank settlement cases works a fraud on the debenture and note holders and frustrates the intention of the settling parties and of Judge Wilkerson. Pursuant to the order of Judge Wilkerson, notices were sent to the debenture and note holders throughout the United States in which it was stated that one of the conditions of the settlement was that the cause of action against the directors was being preserved. The debenture and note holders knew Judge Wilkerson would scrutinize closely the terms and conditions of the settlement and that he would not approve a settlement in a class suit unless he believed it to be a fair and equitable settlement with the banks for the benefit of the entire class.

The procedure in effecting this settlement was the same as prescribed by this Court in Rule 23(c) of the Rules of Civil Procedure. When a settlement is made in a class suit which is binding upon tens of thousands of persons not before the court, this Honorable Court has recognized,

by its promulgation of Rule 23(c), that a compromise should not be permitted to be made except upon the approval of the court. If the intentions of the court approving such a settlement in a class suit are now to be ignored, these absent parties are deprived of the protection intended by the Rule.

Therefore, if the settlement decree and findings filed in the bank suits do not contain the technical language considered necessary by the lower courts in the instant cases to carry out the intention of the parties and preserve the cause of action against the defendant-directors, those decrees and collateral papers should now be revised and corrected by the court which entered them in order to speak the intention of the parties more fully and accurately, and in accordance with their intention, meaning and understanding, and in accordance with the construction placed on them by the parties to the bank settlement cases. Otherwise a gross injustice will have been done as a result of a mistake in the wording of a decree.

With that in mind, the plaintiffs intend to take steps immediately, in the suits against the banks in which the settlement decree and findings were filed and approved (*Celia Kelly* v. *Continental Illinois National Bank and Trust Company of Chicago, et al.*, No. 12357, Aiken R. 115, and *William W. Gregory* v. *Continental Illinois National Bank and Trust Company of Chicago, et al.*, No. 14412, De Met's R. 58) to revise such decrees. The plaintiffs intend to promptly proceed in the District Court where the bank settlement cases are still open and pending for certain purposes and move the District Court at Chicago to revise the settlement decrees and supplemental papers in order to have such decrees and supplemental papers include whatever technical language be required in order to preserve the cause of action against the defend-

ant-directors. When such revisions are made, it will become manifest that the motion by the defendants for summary judgment on the ground that the banks were released and that resulted in the release of the defendant-directors, must be overruled and that the decree of the District Court sustaining the motion for summary judgment, which decree was affirmed by the Circuit Court of Appeals, must be set aside.

If this Court should make a final disposition of the Petitions for Certiorari filed in Cases Nos. 821 and 822, it might be too late for the plaintiffs to gain any benefit from a revision of the decrees aforesaid. It is consequently important that this Court retain jurisdiction of the instant cases, recall its mandate which was issued upon the denial of the Petitions for Certiorari heretofore filed herein and withhold the final disposition of the Petitions for Certiorari until the plaintiffs have a reasonable opportunity to obtain a revision of the settlement decrees and supplemental papers in the bank suits to conform more effectively to the actual agreement, intention, meaning and understanding of the parties to such settlement. Upon such revision being accomplished, we shall then be in a position to ask this Court to grant the Petitions for Certiorari heretofore filed and either to reverse the judgments below or to remand the suits for further proceedings in view of the important change in facts resulting from the revision of the settlement decrees subsequent to the entry of the judgments below. We ask this Court to take this action in accordance with the familiar rule stated in Robertson and Kirkham on Jurisdiction of the Supreme Court of the United States (1936), page 559:

> "It is also not uncommon for the Supreme Court to withhold its ruling upon a petition for certiorari

> until the happening of intervening events shall have assisted in a determination of the question whether the writ should issue."

Under the broad powers of this Court to grant certiorari, there should be no doubt about this Court's jurisdiction to grant this motion in the interest of justice.

A short delay in the final disposition by this Court of these cases can cause no harm. If this Court should make a final disposition of the Petitions for Writ of Certiorari and deny this Motion, it would result in the termination of this phase of the litigation. A delay for a reasonable time in order to enable the plaintiff to adopt the action described above would therefore not result in prejudice to the defendants.

We cannot overemphasize the importance of these cases not only to the thousands of debenture and note holders whose investments were ruined by the defendants' violation of covenants in their debentures and notes but also to the people of the State of Illinois who have been condemned by the Circuit Court of Appeals to an admittedly harsh and technical rule as the result of a misunderstanding by the Circuit Court of Appeals of three decisions of the Illinois courts.

CONCLUSION AND PRAYERS FOR RELIEF.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted and that the orders of this court entered on February 16, 1942, denying the Petitions for Writ of Certiorari filed by the plaintiffs in these two cases, be vacated and that said Petitions for Writ of Certiorari be granted.

In the alternative, it is respectfully urged that the foregoing Motion to recall the mandate, etc. be granted and that this Court withhold its ruling and retain jurisdiction of these suits and enter such further orders from time to time as may serve the ends of justice.

Respectfully submitted,

EDMUND D. ADCOCK,
33 North LaSalle Street,
Chicago, Illinois.

LEWIS F. JACOBSON,
33 North LaSalle Street,
Chicago, Illinois.

ROGER Q. WHITE,
120 South LaSalle Street,
Chicago, Illinois.

ALBERT W. FROEHDE,
77 West Washington Street,
Chicago, Illinois.

GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago, Illinois.

Counsel for Plaintiffs-Petitioners in cases Nos. 821 and 822.

CERTIFICATE OF COUNSEL.

I, Edmund D. Adcock, one of the counsel for the above named Plaintiffs-Petitioners, do hereby certify that the foregoing Petition for Rehearing and the foregoing Motion are presented in good faith and not for delay.

EDMUND D. ADCOCK,
One of the Counsel for Plaintiffs-Petitioners.

APPENDIX.

Affidavit of Lewis F. Jacobson in Support of Alternative Motion to Withhold Final Ruling Pending Proceedings, Etc.

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
COUNTY OF COOK. } ss:

LEWIS F. JACOBSON, being first duly sworn, upon oath, deposes and says as follows:

1. He is an attorney at law, duly licensed to practice in this Court and in the State of Illinois, and is one of the attorneys for plaintiffs in the suits described in the foregoing petition for rehearing and motion, and he is the duly authorized agent of plaintiffs.

2. Affiant further states that he actively participated as one of the attorneys for plaintiffs in the suits brought by the debenture holders and note holders against the Chicago and New York banks, arising out of the affairs of Insull Utility Investments, Inc. and Corporation Securities Company, and that he personally participated in the settlement negotiations with said banks and joined with others in negotiating and consummating such settlement.

3. The settlement agreement with said banks was not personally negotiated by plaintiffs or the members of the class they represent, but the negotiations which resulted in the bank settlement agreement were conducted by persons other than debenture and note holders individually (who lived throughout the United States) and affiant was one of such persons who negotiated the settlement agreement and participated in the consummation thereof, all as shown in greater detail in plaintiffs' verified an-

swers on facts filed below (Aiken R. 224, 233-9, 265-7; De Met's R. 233-245, 248-250), which answers on facts were admitted to be true by defendants' counsel. (Aiken, R. 289.)

4. Sub-paragraph (K) of Paragraph 26 of the Petition filed by the debenture and note holders in the bank suits, was drawn by the representatives of debenture and note holders and the banks for the purpose of preserving the cause of action by debenture and note holders against the directors. (Aiken R. 143, 166; De Met's R. 131.)

5. In view of the fact that in 1940 Judge Briggle, District Judge at that time in these suits against the directors, construed the decree entered by Judge Wilkerson in approving the bank settlement and the papers supplemental thereto to be an effective release of the respondent directors, which construction is exactly contrary to the intent, meaning and understanding of the debenture and note holders and the banks who were parties to such settlement, and their own construction of the settlement agreement and their performance under it, the debenture and note holders will promptly proceed by appropriate motions to seek to amend the decrees entered by Judge Wilkerson in the bank settlement cases and to amend any other orders entered by said Court so as to have such decrees in the bank cases more correctly express the terms of the agreements made by the parties, and more clearly indicate that such decrees and orders were intended to be given the effect *only* of covenants not to sue, and under no circumstances to release or have the effect to release any party liable to the debenture holders.

Affiant further saith not.

LEWIS F. JACOBSON.

Subscribed and sworn to before me this 11th day of March, 1942.

NORMAN M. MERTES,
Notary Public.

FILED
APR 8 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

THOMAS D. AIKEN, et al.,
Plaintiffs-Petitioners,
vs.
SAMUEL INSULL, JR., et al.,
Defendants-Respondents.
No. 821

DE MET'S INC. and ROBERT E. WOOD,
Plaintiffs-Petitioners,
vs.
SAMUEL INSULL, JR., et al.,
Defendants-Respondents.
No. 822

MOTION TO GRANT RELIEF REQUESTED IN ALTERNATIVE MOTION FILED HEREIN ON MARCH 13, 1942.

EDMUND D. ADCOCK,
33 North LaSalle Street,
Chicago, Illinois,
LEWIS F. JACOBSON,
33 North LaSalle Street,
Chicago, Illinois,
ROGER Q. WHITE,
120 South LaSalle Street,
Chicago, Illinois,
ALBERT W. FROEHDE,
77 West Washington Street,
Chicago, Illinois,
GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago, Illinois,
Counsel for Plaintiffs-Petitioners,
in cases Nos. 821 and 822.

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

THOMAS D. AIKEN, et al., Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	No. 821
DE MET'S INC. and **ROBERT E. WOOD**, Plaintiffs-Petitioners, vs. **SAMUEL INSULL, JR.**, et al., Defendants-Respondents.	No. 822

MOTION TO GRANT RELIEF REQUESTED IN ALTERNATIVE MOTION FILED HEREIN ON MARCH 13, 1942.

Now come the above-named plaintiffs-petitioners in each of the above cases and respectfully represent as follows:

1. Petitioners filed in this Court on March 13, 1942 their certain "Joint Petition of Petitioners for a Rehearing and Alternative Motion to Withhold Final Ruling Pending Further Proceedings, etc."

2. On March 16, 1942 this Court denied said Joint Petition for Rehearing but your petitioners are advised by the Clerk of this Court that no action was taken on

the Alternative Motion and the memoranda of cases disposed of by this Court does not indicate that any disposition has been made of said Alternative Motion.

3. Said Alternative Motion is found on page 2, the argument in support thereof on pages 15 to 20, the prayer for relief on page 21 and an affidavit in support thereof on pages 23 to 24 of said "Joint Petition of Petitioners for a Rehearing and Alternative Motion to Withhold Final Ruling Pending Further Proceedings, etc." filed herein on March 13, 1942, which pages are hereby incorporated herein by reference thereto.

4. Unless this Court exercises its supervisory powers, a grave injustice will be perpetrated (see pages 15 to 24 of above-described Alternative Motion).

WHEREFORE, your petitioners pray that an order be entered granting the relief prayed for in said "Alternative Motion to Withhold Final Ruling Pending Further Proceedings, etc." filed herein on March 13, 1942 or that the Court shall grant such other relief as it shall deem just, such as entering a rule on the defendants-respondents to answer said Alternative Motion within a reasonable time, or vacating or modifying the order of this Court entered on March 16, 1942 denying your petitioners' Joint Petition for Rehearing or entering any other appropriate order.

Respectfully submitted,

EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
ROGER Q. WHITE,
ALBERT W. FROEHDE,
GEORGE F. CALLAGHAN,
Counsel for plaintiffs-petitioners in cases Nos. 821 and 822.

CERTIFICATE OF COUNSEL.

I, Edmund D. Adcock, one of the counsel for the above-named plaintiffs-petitioners, do hereby certify that the foregoing Motion is presented in good faith and not for delay.

.....

EDMUND D. ADCOCK,
One of the counsel for plaintiffs-petitioners.